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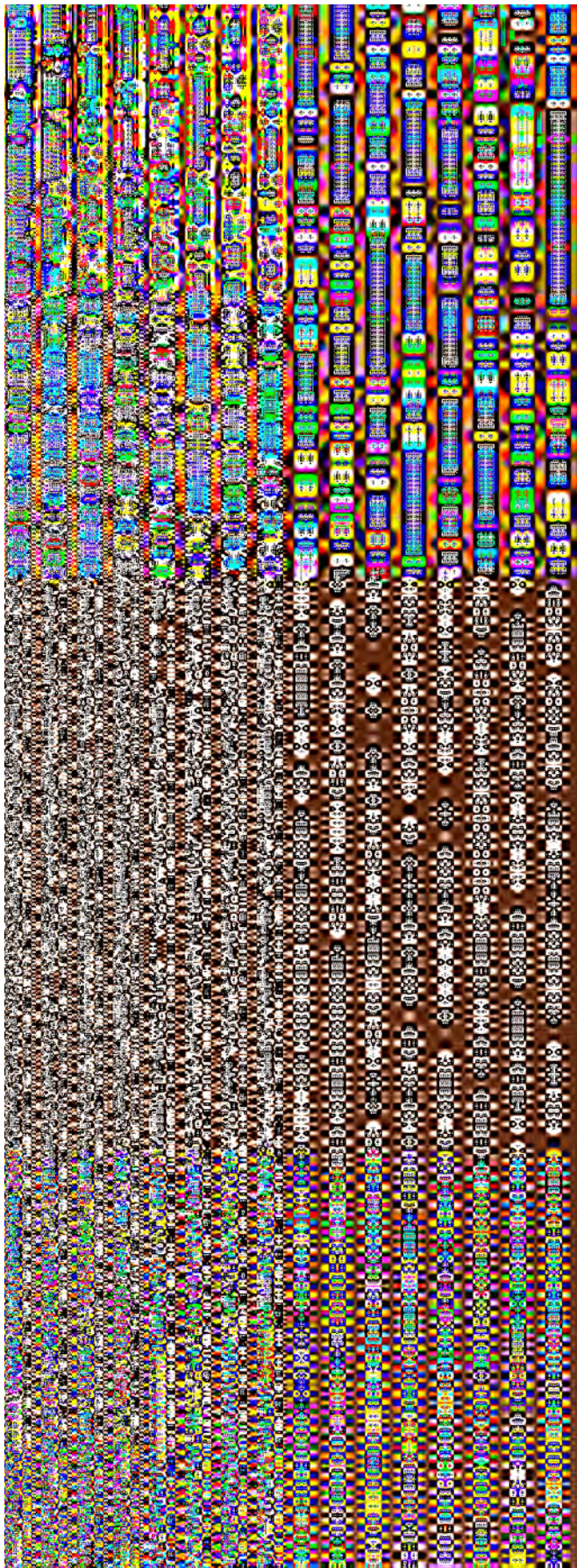
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A
T R E A T I S E
ON
THE LAW OF CONTRACTS
AND
RIGHTS AND LIABILITIES
EX CONTRACTU.

BY
C. G. ADDISON, ESQ.,
OF THE INNER TEMPLE, BARRISTER AT LAW.

LONDON:
W. BENNING & CO. LAW BOOKSELLERS, FLEET STREET.
1847.

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PREFACE.

THE ensuing work, treating, as it does, of contracts of purchase and sale, letting and hiring, borrowing and lending, agency and partnership ; and of the rights and liabilities of landlord and tenant, workman and employer, master and servant, and apprentice, principal and agent, and surety, husband and wife, joint stock companies, shipowners and shipmasters, innkeepers, carriers, infants, lunatics, &c. &c. ; and the stamping and legal authentication and interpretation of contracts, will be found useful, it is hoped, to suitors in the NEW COUNTY COURTS.

It is unnecessary to dilate at length upon the vast importance of the law of contracts, upon its intrinsic excellence and merits, and the advantage of an acquaintance with its general rules and principles to every man of business, as well as to the professed lawyer. From a cursory glance at the contents of the present volume, it will be abundantly evident that there are few mercantile transactions that can be entered into and conducted with safety without some knowledge of the subjects therein treated of. In Germany and Holland the study of the law has long constituted an essential branch of a liberal education ; and it is surprising, that in a commercial country like our own, so little attention should be paid by the public at large to the science of jurisprudence, or at all events to those general rules and principles of our ancient and excellent common law which regulate and control the ordinary intercourse of mankind, and define and ascertain the rights and liabilities of parties under the varying events and circumstances of daily life.

There is scarcely an individual of any property or station in the country, who does not every week, nor any mercantile man who does not every day of the week, nay every hour of the day, contract the obligations, or acquire the rights, of a buyer or seller, of a hirer or letter to hire, of a debtor or

creditor, of a borrower or lender, of a depositor or depositary, of a commissioner or employer, of a receiver or agent, or trustee; and it is absurd, as well as dangerous, for a man to contract obligations, and acquire rights, of which he has no just or accurate perception, and involve himself in liabilities and responsibilities, without knowing the nature and extent of them. There was a period in the history of this country when a knowledge of the law was considered an essential part of education; and Sir John Fortescue tells us, that in his time there were in the inns of court two thousand students, the sons of knights and barons, who were placed there, not to be thoroughly learned in the law, or to get their living by its practice, but to be fitted for the exercise of their duties in private life as noblemen and gentlemen. Lectures and readings on jurisprudence have recently been revived in the inns of court, and some attempt has been made to recommence the teaching of the law as a science, in localities where it has long been practised only as an art; but there seems little reason to expect in these times a revival of the glory and splendour of ancient days.*

It is a popular notion, that the law of England is a mere collection of positive rules, the knowledge of which is desirable so far only as it may be conducive to immediate interest, or may furnish the means of professional employment and remuneration; but however correct this notion may be as regards certain branches of the law, it certainly is not true with reference to the law of contracts, which is not founded upon any positive or arbitrary regulations, but upon the broad and general principles of universal law.

Frequent reference will be found in the ensuing pages to the pandects and institutes of Justinian and the great body of the Roman law, which is so richly stored with general rules and principles illustrative of the law of contracts; and where there is so "surprising an uniformity" with the decisions of our own courts of justice as to have induced many writers to suppose that all the leading rules and principles of the common law have been borrowed from the civil law. In several instances this has undoubtedly been the case—sometimes avowedly, and sometimes without any acknowledgment having been made by the judges and jurists who have resorted to that vast mine of legal knowledge and storehouse of principles, for reasons for their decisions, or for the resolution of their doubts. But in the great majority of instances it is quite evident that the uniformity of principle and decision has arisen from the uniformity of circumstances;—

* The zeal of the Benchers of the Inner Temple in the promotion of legal education may be doubted, since they still continue the objectionable practice of removing volumes of reports and law treatises from the library to their own private chambers, and there detain them for days and weeks.

that similar causes have produced similar effects, and that the same conclusions, founded on natural reason and justice, have naturally been deduced by learned and just men, from the same premises. The law of contracts may justly indeed be said to be a universal law adapted to all times and races, and all places and circumstances, being founded upon those great and fundamental principles of right and wrong deduced from natural reason which are immutable and eternal, and present "a striking uniformity among all nations, whatever seas or mountains may separate them, or how many ages soever have elapsed between the periods of their existence," being "widely different from those laws, which proceeding merely from positive institution are consequently as various as the wills and fancies of those who enact them." *

In the worst period of Roman history, and under the most corrupt and vicious of the emperors, the seats of justice were filled by jurists of integrity and profound learning, and "the purest materials of the code and pandects are inscribed with the names of Caracalla and his ministers." It has been observed by modern writers, that the laws of the Romans, if closely and attentively studied, will be found to form a more interesting part of their history than their victories and their conquests. Cicero, indeed, recommends them to the notice of his countrymen as containing a faithful portraiture of ancient manners, and as inculcating the soundest principles of morals; and in these days they may be resorted to with advantage by all who are desirous of investigating the true sources of juridical science, and studying the grounds and reasons upon which all civil laws are founded. It is not by treasuring in the memory a string of positive enactments or arbitrary rules; but by the study of general principles, or as Littleton saith, by the arguments and reasons of the law, that a man shall come to the certainty and the knowledge of the law, "for the law is unknown to him that knoweth not the reason thereof." †

A large portion of the commendation so frequently bestowed upon our civil law undoubtedly belongs to the honesty and integrity of its administration amongst us, for whatever may be the intrinsic merits of a law, however well it may read in the statute book, or look upon paper, it is a dead letter, or worse than useless, unless it is well and faithfully administered. The machinery of our jurisprudence, guided as it is in this country by upright, independent, and incorruptible judges, moves silently but surely onward, securing the rewards of industry, and the safe tenure of

* Sir William Jones. Introduction to the speeches of Iseus.

† Co. Litt. 395.

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ERRATA.

Several crown cases, beginning *The King v. ———*, and *The Queen v. ———*, have by mistake been ranged under the word "*The*."

THE LAW OF CONTRACTS,

&c.

PRELIMINARY OBSERVATIONS ON DEEDS AND SIMPLE CONTRACTS.

THE law of England recognizes and enforces two great classes of contracts, whose legal incidents and peculiarities are widely different; that is to say, DEEDS or contracts *by specialty*, which are contracts in writing, signed, sealed, and delivered by the parties to them; and contracts by parol, or *simple contracts*, which are made either by word of mouth or are inferred from the silent language of men's conduct and actions, or are put into writing and signed by the parties to them, but are not sealed and delivered.

The execution of a deed or contract under seal is one of the most solemn and authentic acts in law that a man can perform. No cause, motive, or consideration, (except in the case of certain deeds framed to pass estates in land under the statute of uses, presently noticed (a),) beyond the mere will of the executing party, is necessary to give it validity, and no one can be permitted (except on the ground of fraud or deceit) to aver or to prove anything in contradiction to what he has solemnly and deliberately avowed by deed. "Where the contract is by deed, the cause or consideration is not inquirable, nor is it to be weighed, but the party ought only to answer to the deed, and if he confesses it to be his deed, he shall be bound." (b)

A simple contract is, on the other hand, of a much inferior nature to, and has much less force and efficacy than, a deed. It does not, like the latter, *proprio vigore*, constitute and create an immediate obligation, but

(a) Post. p. 14, 16.

(b) Plowd. arg. *Sharlington v. Strotton*, Plowd.

309; Smith's leading cases, vol. ii. p. 456.

presents merely a mode of evidence, and cannot be enforced unless it is founded upon some good or valuable consideration. (c)

An admission or acknowledgment of any matter of fact, authenticated only by the signature of the party making it, may be denied and controverted by extrinsic testimony; but if the written admission be sealed and delivered as a deed, the party is at once estopped from disputing it. Thus an acknowledgment of a debt, or of the receipt of money or goods, or the statement of the consideration for a simple contract, affirmed only by the signature of the party, is evidence only of the debt or of the act of payment, or of the existence of the alleged consideration, it may be contradicted by opposite evidence, and there is no legal objection to the party's showing, if he can, that the acknowledgment or statement is false; (d) but if such acknowledgment be sealed and delivered as a deed, he is at once (if no fraud or deceit has been practised to obtain the admission,) concluded by his own deed, and cannot be permitted at common law to dispute the debt or contradict the payment or statement. (e)

A gratuitous release of a debt made verbally or by writing, authenticated only with the signature of the party, has no intrinsic operation as a release of the debt; it is totally inoperative, unless something has been given or done as the consideration for it; (f) but if the release be made by deed, it at once destroys and annuls the pre-existing claim or obligation operating *proprio vigore* as a direct discharge, totally independent of extrinsic circumstances. (g)

In most countries, and under most systems of jurisprudence, certain forms and solemnities have been wisely established for the purpose of binding men finally and conclusively to the truth and good faith of their acts and representations, and for the due authentication and establishment of contracts.

By the Roman or civil law, all gratuitous promises and engagements, where no earnest was given to bind the bargain, or where the engagement was all on one side, nothing being contracted to be done or performed on the other, were required to be ratified or confirmed in a certain prescribed form, in the presence of a magistrate or public officer, in order that men might not be caught by rash expressions, and drawn unawares and without sufficient deliberation into serious engagements. (h) The gratuitous pro-

(c) Post. ch. ii.

(d) *Skaiſe v. Jackson*, 3 B. & C. 423; *Lampon v. Cooke*, 5 B. & Ald. 611; *Graves v. Key*, 3 B. & Ad. 318; *Berkley v. Walling*, 7 Ad. & E. 38; *Farrar v. Hutchinson*, 9 Ad. & E. 641; *Cowper v. Garbett*, 13 M. & W. 33.

(e) *Pinnell's case*, 5 Co. 117 a. 117 b; *Lainson v. Tremere*, 1 Ad. & E. 792; *Hill v. Man-*

chester and Salford Company, 2 B. & Ad. 544; *Harding v. Ambler*, 3 M. & W. 279; *Goodville v. Bailey*, Cowp. 601, Co. Litt. 352; *Carter v. James*, 13 M. & W. 33; *Baker v. Dewey*, 1 B. & C. 707.

(f) *Lodge v. Dicus*, 3 B. & Ald. 611, 615.

(g) Co. Litt. 212 b., post. chap. 3.

(h) *Perezii*, prælect. p. 71.

mise or undertaking not clothed with the prescribed formalities, (*verbis præscriptis solemnibus vestita*,) was called a *nudum pactum*, or naked engagement, and could not be enforced, for it was thought better, we are told, to let such contracts rest upon the mere integrity and good faith of the parties who contracted them, than to subject them to the compulsory authority of the law; (i) but whenever the contract or promise was properly authenticated under magisterial sanction, it became legally binding, and capable of sustaining an action, whatever might have been the original cause, motive, or inducement for the making of it. (k)

The highest and most authentic contract known to the civil law, was called a *STIPULATION*; it was entered into before the magistrate or public officer, through the medium of interrogatories and answers calculated to explain the nature and extent of the undertaking, to put the parties entering into it on their guard, and to show it to be their mature and deliberate act. (l) A solemn contract of this nature could not afterwards be impeached, except on the ground of fraud or deceit; and could not by the civil law be released or discharged, except by an equally solemn proceeding, conducted by question and answer before the magistrate or public functionary, called an *ACCEPTILATION*. (m)

The civil law did not consider the circumstance of the contract or undertaking being put into writing equivalent to the *verba solemnia*, or stipulation. The written promise, or acknowledgment or note, amounted only to evidence of the fact or transaction, and might be avoided and rendered nugatory by extrinsic testimony. Thus the *obligatio literarum*, or written acknowledgment of a debt, did not induce a complete nor even in some cases a presumptive obligation. It might be bad, because the circumstances giving rise to, or constituting the debt, or forming the consideration for the acknowledgment or undertaking, were not stated and set forth upon the face of the written document; (n) and these circumstances and the consideration when set forth, might in all cases be contested within a certain time. Thus in the case of a written acknowledgment of a loan,

(i) *Vin. Comment. de Instit. lib. 3, tit. 14, p. 669, ed. 1755.*

(k) *Ib. lib. 3. de verborum obligationibus, tit. 16, p. 677. Cod. lib. 7, tit. 52, 6. ed. Gothofred.*

(l) Nimirum leges Romanæ ex nudâ conventionem neminem obligari voluerunt, ne qualescumque promissum, et sermo sæpe inconsultus, magis quam ex voluntate proficiens necessitate juris promittentem illigaret, et litium quoque, ut opinor pericidendarum causâ; sed excogitata est conventio certo modo et forma concipienda celebrandaque, quam deliberati animi certum signum esse voluerunt; et ex quâ certo jure actio compe-

teret; quam conventionem *STIPULATIONEM* dixerunt. *Vinnius* ut sup. lib. 3, tit. 16, p. 677. *STIPULATIONIS* introducendæ ratio hæc una fuit, ut discerni posset, an promissio temere effusa, an vero consulto concepta esset. *Perseus prælect. 2, p. 71.*

(m) *Vin. p. 677. Dig. lib. 45. tit. 1. Cod. lib. 8, tit. 38, 44. Dig. lib. 46, tit. 4. Instit. lib. 3, tit. 30. Pandect. lib. 50, tit. 17. art. 5, par Pothier, vol. 5, p. 254.*

(n) *Vinnius, tom. 2, lib. 3, tit. 22, p. 735, 736.*

an exception *de non numeratâ pecuniâ*, i. e. an exception of money not paid, might be brought within two years, which would put the lender upon proof of the fact of the loan; and after the expiration of two years, the fact might still be contested, but the whole burthen of the proof was then thrown upon the party striving to impeach the written acknowledgment, and show its falsehood. (o) If, however, the acknowledgment was made in the prescribed form before the public functionaries, it was at once conclusive, and no exception could afterwards be brought against it. (p) By the intervention of a stipulation, the written contract at once ceased, the lesser security being merged in the greater. (q)

The continental nations, acting by analogy to the civil law, recognise in general two classes of contracts of a superior and inferior nature, the one being public authentic acts, ratified and confirmed before witnesses, or in the presence of a magistrate or a notary public, or a registrar or judge; the others, private acts, which are entered into and arranged between the parties themselves, without witnesses, and without the ministry or authentication of any public officer. The publicly-authenticated contract carries with it full credit, ("*fait par lui même plein foi*,") but the private act may be questioned and contradicted, and requires some cause or consideration for its compulsory fulfilment. (r)

The force and validity of contracts depend in our own law upon analogous rules and principles. A mere gratuitous promise cannot, as will presently be shown, be enforced, unless it is authenticated and established by writing under seal. "Such a promise or undertaking may be morally good, but it requires ascertainment, and our courts therefore will not enforce it; unless it is ascertained and established by the very highest evidence prescribed by the law, and that is by a solemn and formal contract, sealed and delivered in the presence of witnesses.

(o) *Vinnius*, p. 738. *Peres. prælect.* lib. 4, tit. 80.

(p) *Cod.* lib. 14, tit. 80, § 14, ed. *Gothofred*, p. 238. *Vinnius*, p. 738.

(q) *Ib.*

(r) "L'obligation *sans cause* ne peut avoir aucune effet." *Code Civile*, Liv. 3, tit. 3, a. 4.

CHAPTER I.

ON DEEDS, THEIR REQUISITES AND ATTRIBUTES.

Nature of a Deed.—Formalities necessary to its creation.—Sealing and delivery.—Antiquity of the custom of authentication by seal.—What constitutes a sealing and delivery.—Delivery of a deed as an escrow.—Attestation by witnesses.—Deeds inter partes and deeds poll.—Of the necessity of stamps on deeds.—Inrolment when necessary.—Registration.—Of the effect of the alteration of a deed after its execution.—Deeds requiring a consideration in equity.—No consideration necessary to give effect to a deed at common law.

Nature of a DEED.—A deed is, by the law of England, analogous to the ancient stipulation of the civilians, and the publicly-authenticated contracts of continental jurists. It is a solemn act, by which the parties manifest their positive determination to enter into a binding and conclusive engagement, not afterwards to be impeached or questioned.

"Words," we are told, "pass from man to man lightly and inconsiderately; but where the agreement is by deed, there is more time for deliberation: for when a man passes a thing by deed, first there is the determination of the mind to do it; and upon that he causes it to be written, which is one part of deliberation, and afterwards he puts his seal to it, which is another part of deliberation; and lastly, he delivers the writing as his deed, which is the consummation of his resolution; so that there is great deliberation used in the making of deeds, for which reason they are received as a lien final to the party, and are adjudged to bind the party, without examining upon what cause or consideration they were made. As if I, by deed, promise to give you 20*l.*; here you shall have an action of debt upon this deed, and the consideration for my promise is not examinable, it is sufficient to say it was the will of the party who made the deed." (a) But the instrument must not, of course, be obtained by fraud or deceit, nor impugn any of the rules of law framed and

(a) *Plowden arguendo Sharrington v. Strotton*, Plowd. 1, p. 308 a. 309; *Morley v. Boothby*, 3 Bing. 111, 112. 10 Moore, 404, a. c.; *Fallows v. Taylor*, 7. T. R. 477. Mansfield, C. J.;

Shubrick v. Salmond, 8 Burr. 1639, 1640. Fonblanque on Equity, vol. 1. p. 344, n. a. 2 Finch, 108, 110.

established for the protection of creditors and purchasers; and the parties must be of full age, and competent to contract.

Requisites of DEEDS.—"Every deed ought to have writing, sealing, and delivery; and if the parties be illiterate, it ought to be read also." It may be printed, or written on parchment or paper, and is good and valid, although it mention no time or date, or place of making, or be dated at one time, and delivered at another, or have a false or impossible date. It is essential only that it be sealed and delivered, for "any agreement in writing sealed and delivered becometh a deed." (*b*) By the common law, a deed may be written in any hand, or in any language; but the legislature has required all "certificates, patents, charters, bonds, records, judgments, statutes, and recognizances," to be written in the *English* language. (*c*)

Sealing of DEEDS.—The use of seals for the authentication of contracts and writings, appears to have been almost unknown in England, prior to the Conquest. Under the Anglo-Saxon government, contracts and written declarations and memorials were solemnly ratified with the sign of the cross, in the presence of numerous witnesses, and derived all their force and efficacy from their publicity. (*d*) One of the most ancient sealed documents of any authenticity in England, is the charter of Edward the Confessor to Westminster Abbey. (*e*) Edward the Confessor was brought up in Normandy, and the custom of using seals is said to have been introduced from that country into England, and to have become general shortly after the Conquest. The practice appears to have been originally derived from the far East, where it has prevailed from the most remote antiquity down to the present time. In the Bible, mention is frequently made of letters *sealed* with the king's seal; (*f*) and we are told that "the writing which is written in the king's name, and sealed with the king's seal, can no man reverse." (*g*) From the book of Jeremiah we find, that writings under seal constituted part of the formalities and requisites of a Jewish purchase of land. "And I bought the field of Hanameel, and weighed him the money. . . . And I subscribed the evidence, and *sealed* it, and took witnesses." And in another part of the prophecies we are told, that "men shall buy fields for money, and subscribe evidences, and *seal* them, and take witnesses." (*h*)

(*b*) 11 Co. 27, b. 28, a. Co. Litt. 171, b. Shep. Touch. 1, ch. 4.

(*c*) 4 Geo. 2, c. 28.

(*d*) *Madox*, dissert. xxvi. form. Angl. p. 115, 131, 136, 176. *Spelman's Gloss.* p. 228. *Monast. Angl.* vol. 5, p. 269, col. 1.

(*e*) Co. Litt. 7 a. speaks of a *sealed* charter as early as A. D. 956. Vin. Abr. *Fairs*, 20.

(*f*) 1 Kings, c. 21; see also Daniel, c. 6.

(*g*) Esther, c. 8.

(*h*) Jeremiah, c. 32.

Every sheykh and governor of a village throughout the East, has at this day his own private seal and signet, with which he seals and authenticates his writings and decrees; (i) and it is probable that the common practice of using seals for the authentication of documents, both of a public and a private nature, which became prevalent in different parts of the continent about the time of the crusades, was originally introduced by the pilgrims from Jerusalem. (k) The practice was brought into general use in England, as before mentioned, by the Normans after the Conquest, who caused the ancient Saxon contracts and writings to be sealed with waxen seals in the presence of witnesses, and gave them the names of charters or DEEDS." (k)

The Norman barons and knights had each their own peculiar seals, whereon was engraved the device or cognizance, or coat of arms of the bearer; (l) and we are told that a seal, as well as a military girdle, was granted to persons of noble birth when they came of age. (m)

If a man accidentally lost his seal, it was his duty to give public notice of the fact, to put people on their guard, and prevent them from being deceived and prejudiced by the acts of parties who might have got possession of the seal, and made use of it without the authority of the owner. (n) "If a man," says *Glanville*, "acknowledges the seal attached to a deed to be his own seal, he is bound to warrant the terms of the deed, and in all respects to observe the compact expressed in the deed as

(i) Throughout the East, the impression of the seal is considered of more authenticity than the sign manual. "A person writing to a superior or to an equal, signs his name at the bottom of the letter, and places the seal immediately to the right of the signature; but if he particularly desire to testify his humility, he places it beneath his name." *Lane's Arabian Nights*, note 11, p. 26. See the *Arabian Nights*, *passim*, as to the use of seals, and the story of the amorous lady who "took from her pocket a purse, and drew out from this a string, upon which were the 98 seal rings" of her different lovers!

(k) Chirographorum confectionem Anglicanam quæ antea usque ad Edwardi regis tempora fidei-
lium præsentium subscriptionibus cum crucibus aureis, aliisque sacris signaculis firma fuerunt, Normanni condemnantes, chirographa chartas vocabant; et chartarum firmitatem cum cereâ impressione per unius cujusque speciale SIGILLUM sub instillatione trium vel quatuor testium astantium conficere constituebant. *Ingulp*, p. 901. The charter or deed of confirmation of William the Conqueror to St. Martin's Church at Bath, has a magnificent seal attached to it. *Selden, Radmeri Hist.* p. 166, ed. 1623.

(l) *Dugd. Antiq. Warwickshire*, p. 972. *Dufrene*, Gloss. tom. 3, p. 854.

(m) *Faciemus eum habere cartam et sigillum conani, cum ipse illius ætatis fuerit, quod terram tenere possit et sigillum habuerit. Stabilimenta S. Ludov. Reg. Fran.* lib. 1, cap. 70, 71. *Monast. Angl.* tom. 1, p. 810. *Selden's Titles of Honour*, part 2, chap. 5, p. 651, 652. "Et quia adhuc Miles non eram, et proprium sigillum non habebam, quando hanc concessionem fecimus auctoritate sigilli Domini patris mei cartam istam sigillavimus." . . . "Promisit quod quamcito Miles erit, et sigillum habebit dictum sigillum apponet," &c. *Dufrene*, tom. 3, p. 854.

(n) Memorandum quod publice clamatum est in Banco quod SIGILLUM Benedicti de Hagham, cum uno capite in medio, sub nomine suo, in quacunque manu fuerit, de cætero nullum robur obtineat.

Mem. quod Henricus de Perpoun die lunæ — venit in Cancellariâ apud Lincolniam et publice dixit quod SIGILLUM amisit; et protestabatur quod si aliquod instrumentum cum sigillo suo post tempus illud inveniretur, consignatum illud nullius esse valoris vel momenti . . .

Joannes B. recognovit in cancellariâ regis se amisiâ SIGILLUM suum, et petit quod dicto sigillo deinceps non habeatur fides. *Dugd. Antiq. Warwick*, p. 673.

contained in it without question ; and it is to impute it to his own indiscretion if he incur loss by negligently preserving his own seal." (o)

When the increase of trade and commerce had diffused wealth amongst the inferior classes of society, the use of seals was no longer confined to the great lords and the landed gentry ; the rich burghers and merchants of the towns acquired land, and made grants thereof under seal, and adopted any kind of mark, stamp, or device, that suited their pleasure or convenience as their seal for the purpose of executing deeds. It was held that a deed was sufficiently sealed if a man publicly acknowledged, in the presence of witnesses, that the seal attached to the deed was his seal, although the seal might never have belonged to him, and might have been fixed to the parchment prior to its engrossment ; and this gradually gave rise to the present loose, and senseless, and unsatisfactory mode of authentication by seal. The safeguards are removed ; but the contract retains all its original force and vitality. (p)

It now rarely happens, that the party executing a deed actually seals it with his own hands, or with his own seal. The seal, which is usually some old wafer stamp, or a button, is fixed or compressed on the deed by the person professionally employed ; the executing party merely acknowledging, in the presence of witnesses, the seal to be his seal. " If a stranger seal a deed, by allowance or commandment precedent, or agreement subsequent of him that is to seal it, before the delivery of it, it is as well as if the party to the deed did seal it himself, and therefore if another man seal a deed of mine, and take it up after it is sealed, and do deliver it as my deed, this is said to be a good agreement to and allowance of the sealing, and so a good deed. And if the party seal a deed with a seal that is not his own seal, or with a stick, (!) or any such like thing which doth make it a *print*, it is good ; and although it be a corporation that doth make the deed, yet they may seal with any seal besides their common seal." (q)

It has been held also that one and the same seal may be the seal of half a dozen persons at the same time. Thus, where one of two partners, in the presence of the other, and by his authority, sealed a deed for them both, but there was but one seal, and the seal did not appear to have been put twice upon the wax, it was held that the execution by the one partner operated as the execution of both, upon the authority of Lord Lovelace's case, where it was said " that if one of the officers of the forest put one seal to the rolls by assent of all the verderers and other

(o) *Glanville by Beames*, p. 262, 263.

(p) 11 Co. 27 b. ; Co. Litt. 171 b. ; Shep.

Touch. 1 ch. 4.

(q) *Sheppard's Touchstone*, chap. 4.

officers, it is as good as if every one had put his several seal; as in case divers men enter into an obligation, and they all consent, and set but one seal to it; it is a good obligation of them all." (r) But they must all be actually present consenting to the act; otherwise the execution is not good. (s) The sealing, or the acknowledgment of the seal, must be made *after* the deed has been written, and *before* its delivery; for if a blank piece of paper or parchment be sealed and delivered, and afterwards written upon, it is no deed. (t) It has accordingly been held, that a bail bond, which had been executed before the condition was filled up, was absolutely null and void, (u) and that a deed of conveyance or transfer of shares, executed by the proprietor of such shares, with the name of the purchaser in blank, and handed over by him to the plaintiff, by whom, on the sale of such shares to the defendant, the defendant's name was inserted as such purchaser, was void. (x)

DELIVERY.—The delivery of a deed may be made either by the acts of the parties or by express words, it being sufficient, if the parties testify in any clear and unequivocal manner, their intention of delivering the instrument as their deed. "It may be made by the party himself that doth make the deed, or by any other, by his appointment or authority precedent, or assent, or agreement subsequent;" (y) and it has been held that circumstances alone may be equivalent to a delivery where no actual delivery can be proved, for where the party to a deed was shown to have acted under the instrument, and to have done a variety of things confirmatory of the contract, Lord Mansfield held that the acts so done amounted to an acknowledgment of the delivery of the deed. (z) But the mere manual delivery or handing over of a sealed contract, unaccompanied by evidence of the intention of the party to deliver it as his deed, will not be sufficient to impart to the contract the character and effect of a deed; (a) and if it should appear that the contract was delivered conditionally, and not with a view of its immediately taking effect as a deed, it is said to be *delivered as an escrow*, and an action cannot be maintained upon it until the condition has been performed.

Delivery of a deed as an escrow.—"It is now settled," though the law was otherwise in ancient times, as appears by Sheppard's Touchstone, that in order to constitute the delivery of a deed as an escrow, it is not

(r) *Ball v. Dunsterville*, 4 T. R. 313; *The King v. Longnor*, 4 B. & Ad. 647.

(s) *Harrison v. Sykes*, 7 T. R. 207.

(t) *Perkins*, § 118, Com. Dig. Fait. A. 1.

(u) *Powell v. Duff*, 3 Campb. 181.

(x) *Hibblewhite v. M. Morine*, 6 M. & W. 200.

(y) *Shep. Touch.* 1 ch. 4, p. 57. -

(z) *Goodright v. Strapham*, Cowp. 201; C. R. Litt., 36; 2 Rolfe Abr. 26; Vin. Abr. Fais.

(K.)

(a) *Stanton v. Chamberlin*, Ow. 95; Cro. E. 122 a. c.

necessary that it should be done by express words, but you are to look at all the facts attending the execution,—to all that took place at the time, and to the result of the transaction; and therefore though it is in form an absolute delivery, if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow," (b) and will not consequently have the character and effect of a deed until the event has happened, or the precedent condition has been performed. (c)

Attestation by witnesses.—The most useful formality attending the making of a deed, now that the practice of sealing has become a mere empty form, is the attendance of witnesses to attest the execution of the contract. Their presence is not essential to the validity of the deed, but is generally requisite to establish the fact of the sealing, or of the acknowledgment thereof, and of the due performance of those ceremonies and circumstances which are required by law to constitute a valid execution of the instrument; (d) and here it may be observed, as it has been made the subject of express judicial determination, that the mere placing of a seal to a written contract will not make the contract a deed. Thus, where an action of assumpsit had been brought upon certain articles of agreement, which, when produced, were not only signed by the parties, but had a seal opposite to each signature, it was contended that the plaintiffs ought to be nonsuited, as they should have declared upon a deed, but it appeared that the seals had been affixed to the document through ignorance and by mistake: and it was accordingly held, that the placing of a seal opposite to the name of the party, though evidence of a deed and one of the formalities belonging to it, was not to be taken as conclusive. If the parties did not mean to contract by deed, and had made use of the seal in ignorance of its legal effect, the contract would have the force and effect only of a common agreement. (e) It would be advisable, indeed, in all cases to require strict proof that the seal attached to a written contract was affixed thereto and acknowledged by the party, and that the contract was delivered with the intention of giving to the instrument the character and effect of a deed, inasmuch as the contract, though bad as a deed, might yet, under certain circumstances, be good as a common agreement or simple contract. (f)

(b) Parke, B., *Bowker Burdekin*, 11 M. & W. 147.

(c) *Johnson v. Baker*, 4 B. & Ald. 440; *Murray v. Earl of Stair*, 2 B. & C. 82; Perk., sect. 137.

(d) *The King v. Longnor*, 4 B. & Ad. 647, 1 N. & M. 576 s. c.; *Burling v. Paterson*, 9 C.

& P. 570; *Garrett v. Lister*, Lev. 25.

(e) *Clement v. Gunhouse*, 5 Rep. 82, 83; *Goodright v. Gregory*, Loft. 339; *Davidson v. Cooper*, 11 M. & W. 778.

(f) *The King v. Ridgewell*, 9 D. & R. 678, 6 B. & C. 665, s. c.

DEEDS *inter partes* and DEEDS *poll*.—When a deed is made between several persons, it is called a deed *inter partes*, and also an indenture. When it is made by one person alone, it is called a deed *poll*. The indenture or deed indented takes its name from the ancient practice of writing as many copies or parts of the deed as there were parties on one large sheet of parchment, in order that each party might have his part, and then cutting them off in a notched or wavy line, by which means they could at any time be compared together and identified. (g) The deed *poll* was so called, because the paper was polled or cut even, there being, as there was only one party to the deed, no necessity for a counter-part. It was anciently called *charta de una parte*. (h) All the parts of a deed indented in judgment of law do make up but one deed, and every part is of as great force as all the parts together, and they are esteemed the mutual deeds of either party, and either party may be bound by either part of the same. It is not necessary that all the parts should be sealed and delivered by all. If, for example, there be two parts, and the one party seal the one; and the other the other, then it is the deed of both, for the two constitute but one deed in law. (i)

The most numerous class of deeds *poll* are bonds and obligations, which comprise every species of written acknowledgment, undertaking, or engagement, sealed and delivered as a deed, whereby a man either vouches for or binds himself to the truth of any particular state of facts, or engages with another by any intelligible form of words to do or not to do any particular act or thing. (k) He that makes the deed is called the obligor, and he to whom it is made is called the obligee. Bonds, obligations, and all kinds of deeds *poll*, are further distinguished from deeds *inter partes* from there being no mutuality of contract or obligation. Several persons may become bound to one person, or one person to several; but the engagement is all on one side, nothing being contracted for or given on the other, while in the case of the deed *inter partes*, there is a mutual contract and agreement between the several persons who are made parties to the deed.

STAMPS.—Every contract under seal is now required to be stamped before it is admissible in evidence in a court of justice. All apprenticeship deeds must be stamped with a premium stamp within the time limited by the act of 8 Anne c. 9, or they are absolutely void, (l) and

(g) Co. Litt. 229 a.; Shep. Touch. p. 50; Madox, p. 28, 29.

(h) Co. Litt. 229 a.; 229 b.

(i) Ib. 330 a., 330 b.

(k) Shep. Touch. ch. 21.

(l) Sa. 36, 39; *Rex v. Chipping Norton*, 5

B. & Ald. 412; *Rex v. Church Hulme*, 5 B. & Ad. 1029, n. b. By 5 Geo. 3, c. 46, s. 19, a printed memorandum is to be added to printed deeds of apprenticeship, *Stokes v. Twicken*, 2 Moore, 586; 8 Taunt. 492, s. c.

all other deeds, if unstamped at the time of the execution thereof, must be stamped, and the penalty of the omission paid, before they can be made available by way of action. The amount and value of the stamp is in all cases regulated by the character and description of the deed, the value of the subject matter of the contract, or the amount of the consideration expressed upon the face of the instrument, according to the provisions of a schedule which embraces every class and description of contract under seal; (*m*) and in order to ascertain and fix the amount of duty to be paid, it is enacted that the consideration for the contract, when any exists, shall be truly disclosed in words at length upon the face of the deed. All apprenticeship deeds are made absolutely *void*, unless the premium received or contracted to be given with a clerk or apprentice is truly inserted in such deeds, (*n*) and heavy penalties are imposed upon the parties to, and the persons who prepare deeds of conveyance made upon the sale of any real or personal property, or securities for the payment of any annuity, or the enjoyment of any easement or right not before in existence, unless the full amount of the purchase or consideration money which shall be directly or indirectly paid or secured or agreed to be paid for the same, shall be truly expressed and set forth in words at length in such deed, of conveyance or security. (*o*)

All attested copies of deeds also require a stamp ere they can be given in evidence.

INROLMENT.—To the forms and ceremonies established by the common law for the due authentication and establishment of deeds, the legislature has, in certain cases, added the necessity of *inrolment*.

By the 27 Hen. 8, c. 16, all deeds of bargain and sale of manors, lands, tenements, &c., transferring any estate of inheritance or freehold from one person to another, or creating a use in lands, &c., are required to be inrolled in one of the king's courts of record at Westminster, or before the *custos rotulorum*, and two justices and the clerk of the peace of the county where the lands lie, within six months of the date of the execution of such deed. (*p*)

Annuity deeds.—The 53 Geo. 3, c. 141, also requires a memorial of all deeds granting *annuities* or *rent charges* to be inrolled in the Court of

(*m*) 48 Geo. 3, c. 149; 55 Geo. 3, c. 184; *Robinson v. Drybrough*, 6 T. R. 317; *Clayton v. Burtenshaw*, 7 D. & R. 800; *Warren v. Howe*, 3 D. & R. 494. See Chitty on the Stamp Laws.

(*n*) *Stokes v. Twicken*, 2 Moore, 538.

(*o*) 48 Geo. 3, c. 149, ss. 22, 25; *Robinson*

Macdonnell, 5 M. & S. 228; *Duck v. Braddyll*, 13 Fr. 455; *Boone v. Mitchell*, 1 B. & C. 18; *Doe v. Lewis*, 10 B. & C. 673; and see Chitty on Stamps, by Hulme, p. 13, ed. 1841.

(*p*) Extended to Counties Palatine by 5 Eliz. c. 26. See *Crabbe's Dig. of the Statutes tit. INROLMENT*.

Chancery, specifying the names of the parties and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent charge shall be granted, and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration or considerations for granting the same, (*q*) and the annual sum or sums to be paid, and declares that in default of such inrolment, every such deed shall be null and void to all intents and purposes. And the act further requires the names of the persons beneficially entitled to take the annuity to be described in the deed in terms corresponding with the inrolment.

REGISTRATION.—No deed of conveyance affecting any honours, manors, lands, tenements, &c., in the counties of York and Middlesex can prevail against, or interfere with, the claims of subsequent purchasers and mortgagees, unless a memorial of such deed in the form prescribed by act of parliament be duly registered in certain public registration offices. (*r*) The effect of the registration acts in these counties is not to vitiate the deed as between the parties thereto, but to render it void and ineffectual as against all persons subsequently claiming an interest in the lands, &c. under a regularly registered deed founded upon a valuable consideration. (*s*) “They take away the priority of the party whose title is not registered in favour of subsequent claimants whose titles are registered, but they were never intended to operate between the parties themselves to shield them from the consequences of their own acts.” (*t*)

By 15 Car. 2, c. 17, certain leases of lands in the Bedford Level are also required to be registered.

Effect of alteration of a DEED.—If a deed *after* delivery is altered in any material point, whether the alteration be made by the party holding the deed or seeking to enforce it, or by a stranger, the deed thereby becomes void, as against the party fraudulently intended to be affected by the alteration; (*u*) and if material blanks purposely left in the deed are filled up *after* the deed is executed with the assent of all the parties to the instrument, the deed must be redelivered, (*x*) and must have a fresh stamp. (*y*)

An estate or interest once granted by deed cannot, however, be de-

(*q*) *Few v. Backhouse*, 8 Ad. & E. 789; *Earle v. Browne*, 10 Ad. & E. 412.

(*r*) 2 & 3 Anne, c. 4; 6 Anne, c. 35; 7 Anne, c. 20; 8 Geo. 2, c. 6; 25 Geo. 2, c. 4.

(*s*) *James v. Gibbons*, 9 Ves., jun. 407; *ex parte Coles*, 1 Deac. & Ch. 100; *Doe v. Allsop*, 5 B. & A. 142; *Sumter v. Cooper*, 2 B. & Ad. 223.

(*t*) *Le Blanc. & Bayley*, Just.; *Hodson v.*

Sharpe, 10 East, 350. *Crabbe's Dig. tit. REGISTRATION.*

(*u*) *Pigott's case*, 11 Co. 27 a.; *Davidson v. Cooper*, 11 M. & W. 799.

(*x*) *Markham v. Gonaston*, 9 East, 354 n.; *Hudson v. Revolt*, 5 Bing. 368; *Hall v. Chandless*, 4 Bing. 123; *Keele v. Wheeler*, 13 Law Journ. Rep. C. P. 170, part 8, n. a.

(*y*) *French v. Patton*, 9 East, 351.

stroyed or affected by the subsequent alteration or destruction of the instrument under which it was created. (2)

" There is no doubt but that in the case of a deed any material alteration, whether made by the party holding it, or by a stranger, renders the instrument altogether void from the time when such alteration is made. This was so resolved in *Pigott's case*, and though it was contended in argument that the rule has been relaxed in modern times, we are not aware of any authority for such a proposition, when the altered deed is relied on as the foundation of a right sought to be enforced. The case is different where the deed is produced merely as proof of some right or title created by or resulting from its *having been executed*; as in the case of an ejectment to recover lands which have been conveyed by deed. There what the plaintiff is seeking to enforce is not in strictness a right under the deed, but a right to the possession of the land, resulting from the fact of the deed having been executed. The moment after its execution the deed becomes valueless, so far as it relates to the passing of the estate, except as affording evidence of the fact that it was executed. If the effect of the execution of such deed was to create a title to land, that title cannot be affected by the subsequent alteration of the deed, and the principles laid down in *Pigott's case* would not be applicable. But if the party is not proceeding by ejectment to recover the land conveyed, but is suing the grantor under his covenants for title or other covenants contained in the deed, there the alteration of the deed in any material point, after its execution, whether made by the party or by a stranger, would certainly defeat the right of the party suing to recover." (a)

Deeds requiring a consideration in equity.—It has previously been mentioned that there are certain deeds intended to pass estates in land under the statute of uses, which form an exception to the general rule of law, that no cause or consideration is essential to the validity of a contract under seal. These are a bargain and sale of lands and a covenant to stand seized to a use, and the necessity of a consideration to give effect at law to these deeds, has arisen in the following manner. On the introduction into England of the doctrine of uses by the clerical chancellors of ancient times, it was held that when a man had sold land for money, without making a formal conveyance of the land by livery of seisin or delivery of the possession thereof to the vendee, (which was necessary by the common law in order to transfer the property to the latter,) the right to take the profits or "*the use of the land*" passed in equity to the vendee, the vendor

(2) *Bolton v. Bishop of Carlisle*, 2 H. Bl. 264; 4 B. & Ald. 677.

(a) *Davidson v. Cooper*, 11 M. & W. 800.

being considered by the Court of Chancery a trustee for the vendee, and accountable to him for the receipt of the rents and profits. But in order to constitute a bargain and sale in equity so as to raise the use, *money* must have been paid by the vendee for the land, and when bargains and sales were made by deed, inrolled pursuant to the stat. 27 Hen. 8, chap. 16, this doctrine continued to be upheld, and although the deed testified the fact of a bargain and sale, yet the document was considered by the Court of Chancery to be invalid and ineffectual, unless it was either averred in the deed, or could be proved by extrinsic evidence, that a pecuniary consideration had been given for the land. (b) The same idea was transplanted from the courts of equity into the courts of law, when the latter were compelled to take cognizance of, and to give effect to, uses, under and by virtue of the statute of uses; (27 Hen. 8 chap. 10, transferring the possession of the land to the person who had the use;) but it has been worn down by *legal* rules and *legal* decisions, to a mere shadow. It has been held, for instance, in *courts of LAW*, that a pecuniary consideration of ONE PENNY is sufficient to raise the use in the case of a bargain and sale of a freehold interest in land, (c) and the reservation of a PEP-
PER CORN RENT, in the case of a bargain and sale of a term of years. (d)

And if the consideration is stated upon the face of the instrument, the deed of bargain and sale is valid and effectual, though the averment may be false, for no evidence can be admitted, as before mentioned, to contradict the deed. (e)

In the covenant to stand seised to a use, the Court of Chancery also required some good consideration, such as blood, or kindred, or marriage, before it would interfere to give the covenantee the use of the land, and the courts of law consequently, in expounding and giving effect to uses under the statute of Hen. 8, would not suffer the deed to operate as a transfer of the property to the covenantee, unless there had been such a consideration as was required in Chancery to raise the use, or some pecuniary consideration had been given for the land, in which last case they gave effect to the covenant as a deed of bargain and sale. (f)

This notion of a *consideration* in the case of a DEED is entirely a creature of equity, "you shall never find a reason for it to the world's end in the LAW." (g) It springs up concurrently with, and to a certain extent

(b) *Sanders on Uses*, p. 46, 47, 49; *Jones v. Morley*, 1 Baym. 290.

(c) *Sheppard's Touchstone*, p. 511, 514; *Gilbert by Sugden*, p. 92, 248, 408.

(d) *Barker v. Keate*, 2 Mod. 249; 1 Freem. 249, s. c.; 2 Vent. 35, s. c.

(e) *Gilbert ut sup.*, p. 91, 96; *Fisher v. Smith*,

Moore, 570; *Peacock v. Monk*, 1 Ves. senr. 127; *Clarkson v. Hanway*, 2 P. Wms. 208; *Villers v. Beaumont*, Dyer, 146 b.; *Sanders on Uses*, p. 46, 47, 49; *Rowntree v. Jacob*, 2 Taunt. 141; *Baker v. Dewy*, 1 B. & C. 707.

(f) *Gilbert on Uses by Sugden*, p. 91.

(g) *Bacon on Uses*, by Rowe, p. 14.

formed the groundwork of the doctrine of uses, and appears to have been pushed by courts of equity far beyond its proper limits. In the early periods of our legal history, for example, a gift or grant of land, or, as it was called, after the introduction of feuds, "a *feoffment*," (from the verb *feoffare* or *infeudare*, to give one a feud or fee,) preceded or followed up by *livery of seisin* or delivery of the possession of the land to the grantee or feoffee in the presence of witnesses, operated as a complete transfer of the property so as to give the grantee or feoffee the possession of the land or the feud, and the enjoyment of the rents and profits thereof. After the introduction of uses, however, it was held that if there had been no consideration for the feoffment, there was a *resulting use* for the benefit of the grantor, although the feoffment was made by deed, so that the grantee or feoffee was no longer seised of the land to his own use, but was compelled by the Court of Chancery to hold the land for the benefit of the grantor, and was made accountable to the latter for the receipt of the rents and profits, "and the reason," we are told, "seems to be this: When a man made a feoffment in fee without consideration, whereby the feoffee come into the land for nothing, it was thought very reasonable and equitable that the feoffee coming to a considerable estate, without giving anything in exchange for it, should stand seised to the use of the feoffor; it not being imagined that any man would give away an estate without any consideration for it." (A) The result of this profound doctrine has been to render a gift of land through the medium of the ancient charter of feoffment with *livery of seisin* of no legal force or effect at all; for, by the statute of uses, (27 Hen. 8, chap. 10,) the legal estate, the very instant that it reaches the feoffee, follows the resulting use to the feoffor, and being united to that according to the statute, the feoffor is seised precisely as before! (†) But here again, if the use is declared upon the face of the deed, the equitable doctrine of the resulting use is at once rebutted, for nothing can be intended contrary to the deed. (k) If, therefore, the feoffor, by express words in the deed, gave the land to the feoffee and his heirs *to the use* of the feoffee and his heirs, then the right to the land was in the feoffee "by reason of the express use contained in the deed;" (l) and the latter became immediately, by force of the statute, complete owner, both at law and in equity!

(A) *Gilbert on Uses* by Sugden, p. 415, 416; *Sheppard's Touchstone*, chap. 24; *Villers v. Beaumont*, Dyer, 146 b.; *Vin. Ab. Uses*, (F.) (G. 4.)

(†) *Vin. Ab. Uses*, (X. a.) (Y. a.)

(k) *Gilbert ut sup.*, p. 110, 415, 416; *Bacon*, p. 14; *Tippen v. Cozen*, 4 Mod. 381; 1 Raym. 33; *Sanders on Uses*, 208.

(l) *Anderson*, p. 37, xcv.

CHAPTER II.

ON SIMPLE CONTRACTS AND THE CONSIDERATION NECESSARY TO SUPPORT THEM.

SECTION I.—Of the nature of a Simple Contract—A valuable consideration essential to its validity—Gratuitous promises—Nuda pacts—Gifts—Insufficient and nugatory considerations—Illegal and void considerations—Failure of the consideration.

SECTION II.—What amounts to a valid consideration—Acts of omission and commission—Works and services—Services and benefit rendered to a third party at the request of the promisor—A by-gone act or service performed, or rendered pursuant to his previous request—The forbearance or suspension of a legal right—The abandonment of a doubtful claim—Trust and confidence reposed in the promisor—Mutuality of contract and obligation—Contracts founded upon mutual promises—Contracts between adults and infants—Contracts of sale—Contracts of marriage—Of the assent of the parties—Distinction between mere offers and proposals and a definitive contract—Offers of marriage—Offers of sale and purchase—Biddings at auctions.

SECTION I.

NATURE OF A SIMPLE CONTRACT.

THE solemnity and deliberation with which, on account of the ceremonies to be observed, deeds are presumed to be entered into, attach to them an importance and a character which do not belong to a simple contract, and many differences and distinctions consequently exist in the rules and principles of law regulating the right of action upon the one class of contracts and the other.

Simple contracts are, as before mentioned, promises or agreements made either by word of mouth or put into writing and signed by the parties to them, but not sealed nor delivered. As contracts of this nature are lightly made, and frequently entered into without thought or deliberation, courts of law have wisely declined to give effect to them, unless there be some consideration, good cause, or sufficient motive in law, for their compulsory fulfilment. The party making the promise must have obtained some advantage, or the party to whom it is made must have suffered some loss, or sustained some injury and inconvenience, in consequence of the

one party making, and the other accepting the promise; and this rule has been wisely established by the law for the purpose of protecting weak and thoughtless persons from the consequences of rash, improvident, and inconsiderate engagements. (a)

When, indeed, the advantage is all on one side, the transaction is naturally regarded with doubt and suspicion, and when we reflect upon the hasty and imprudent promises and declarations which are frequently made, on the imperfection of language, the loose way in which people are apt to express themselves, and the misconstruction and misunderstanding which consequently ensue, we must admit that it is right and proper that courts of law should decline to enforce mere gratuitous promises, unless the parties take care to clothe them with those solemn legal formalities which are presumed to manifest due deliberation and reflection.

"The enforcement of such promises," observes Lord Denman, "by law, however plausibly reconciled by the desire to effectuate all conscientious engagements, might be attended with mischievous consequences to society, one of which would be, the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duties be rendered more difficult." (b)

"There are many rights and duties of moral obligation," also observes Dr. Story, "which the law does not even attempt to enforce. It deems them of imperfect obligation, and therefore leaves them to the conscience of the individual. And, in a practical sense, there is wisdom in this course; for judicial tribunals would otherwise be overwhelmed with litigation, or become the scenes of the sharpest conflict upon questions of casuistry and conscience. It is a fundamental principle of the common law that a valuable consideration is necessary to support every parol contract, and the importance of such a consideration is never lost sight of except in solemn instruments under seal. A gratuitous promise not under seal, is therefore absolutely void; it has no legal existence or power." (c)

Gratuitous promises and undertakings not clothed with the formalities prescribed by the civil law to render them legally binding, were, as we have already seen, termed *naked engagements*, and did not induce any legal right. They were thus defined by the civilians.

(a) *Tantum meminimus, distinguendas esse promissiones serias, meditata et utiles, ab inconsideratis, temerariis atque inutilibus, cum quis non dispositive, ut loquuntur, nec serio, sed vel narrative, vel per jocum, et aliud agens aliquid*

pronuntiat, ut ex illis tantum, non ex his obligatio et actio narratur.—*Vinnius*, p. 661.

(b) *Eastwood v. Kenyon*, 11 Ad. & E., 450, 451.

(c) *Story on Bailments*, 120, 121.

"A naked promise is, that where no cause for the undertaking exists beyond the mere undertaking itself, but where a cause for it is conjoined with the undertaking, then it becomes a binding obligation, and an action will lie." (d)

Bracton, who wrote *temp.* Hen. III., is the first of our lawyers who marks the distinction as existing in the English law. He treats of *naked* contracts and contracts clothed with a consideration, and advocates, in the language of the civilians, the well-known principle "*ex nudo pacto non oritur actio.*" (e)

In "Doctor and Student" it is observed, "A nude or *naked* promise is where a man promiseth another to give him certain money such a day, or to build a house, or to do him such certain service, and nothing is assigned for the money, for the building, nor for the service; these be called *naked* promises, because there is nothing assigned why they should be made; and I think no action lieth in those cases, though they be not performed. . . . Also if I promise to another to keep him such certain goods safely to such a time, and after I refuse to take them, there lieth no action against me for it; for if the promise be so *naked*, that there is no manner of consideration why it should be made, then is a man not bound to perform it, for it is to suppose that there was some *error* in the making of the promise." (f)

So in Sheppard's Touchstone it is observed, "If a man do by his DEED, under his hand and seal, bargain and sell goods and chattels without any consideration at all, the same may pass well enough; for when there is the solemn act of a DEED, no express consideration is, as between the parties required, but if the contract be by word of mouth or by writing not sealed and delivered, if there be no consideration or no good consideration for it, it is of no effect at all. And therefore, if a man by word of mouth sell to me his horse, or any other thing; and do not deliver the horse, &c., and I give him or promise him nothing for it; this is void, and will not alter the property of the thing sold." (g)

A father made a parol gift of some colts to his son, but kept them in his own possession until the day of his death. The son brought an action against the executors for the colts, but it was held that as there had been no delivery of them to the son, and no change of possession, the pro-

(d) *Nudum pactum est ubi nulla subest causa præter conventionem; sed ubi subest causa, fit obligatio, et parit actionem.*—*Plowd.* 309 a., *Vinnius*, p. 659.

(e) *Pacta et conventa nuda sunt aliquando, aliquando vestita, quæ si nuda fuerint, exinde*

non sequitur actio, quia ex nudo pacto non nascitur actio. *Bracton* de legibus, lib. 3, cap. 1, fol. 99; ed. 1569.

(f) Doctor and Student, Dial. 2, chap. 24.

(g) Sheppard's Touchstone by Preston, p. 224, 225.

perty in them remained unaltered. "In order to transfer property by *gift*," observes Abbott, C. J., "there must either be a DEED or instrument of gift, (under seal,) or there must be an actual *delivery* of the thing granted to the donee." (*h*)

By the civil law all gifts exceeding the value of five hundred crowns were required to be publicly registered at the time of the making of the gift, that men might not part with their property *rashly* or *make pretended gifts* to DEFRAUD their creditors. (*i*)

NUDA PACTA.—If one man promises to give another £100, or to perform certain work for him, such as to build or repair a house, without stipulating for any payment or compensation in return, the undertaking is a *nudum pactum*, as the advantage is all on one side, and nothing is contracted to be done or given on the other; but it is otherwise if the man actually enters upon the work and leaves it unfinished. (*k*) A promise by one man to pay a debt already incurred by another is a *nudum pactum*, and so also is a promise by a creditor to accept less than the full amount of an ascertained debt, or to give time for the payment thereof. Thus, a receipt signed by the plaintiff for the sum of 17*l.* 10*s.* 0*d.*, in full satisfaction and discharge of a debt of 50*l.*, was held to be totally inoperative. "It cannot be pretended," observes Lord Ellenborough, "that a receipt of part only, though expressed to be in full of all demands, must have the same operation as a release under seal. It is impossible that acceptance of 17*l.* 10*s.* 0*d.*, is an extinguishment of a debt of 50*l.* There must be some consideration for the relinquishment of the residue: something collateral to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*." (*l*)

A promise to pay money to a person not entitled to receive it, is a *nudum pactum*, and no action will lie for the non-performance of the promise. (*m*)

If an heir promise to pay the bond of his ancestor, when the heir is not bound by the bond, this is a *nudum pactum*, and cannot be enforced. So, also, is a promise by a widow to pay her husband's debts, or to pay a note given by her when under coverture (*n*)

A promise, on the abandonment of an immoral connexion with a woman,

(*h*) *Irons v. Smallpiece*, 2 B. & Ald. 551. By the civil law gifts were required to be publicly registered.

(*i*) Cod. lib. 8, tit. 54. Dig. lib. 42, tit. 8.

(*k*) *Elsie v. Gateward*, 5 T. R. 143, 148.

(*l*) *Fitch v. Sutton*, 5 East. 232. *Lodge v. Dicus*, 3 B. & Ad. 611, 615. *Pinnell's case*, 5

Co. 117 a. 117 b. *Cooper v. Phillips*, 1 C. M. & R. 649.

(*m*) *Clay v. Willis*, 1 B. & C., 364.

(*n*) *Barber v. Fox*, 2 Saund. 135, 137, h. 1. Vent. 159, s. c. *Loyd v. Lee*, 1 Str. 94. *Goodwin v. Willoughby*, Latch 142, Poph. 177, s. c. *Fabian v. Plant*, 1 Show. 178.

to pay her a sum of money, or an annuity, in consideration that she will thenceforth lead a good and virtuous life, is a *nudum pactum*, and cannot be enforced, although the woman may have been seduced by the promisor. (o) And where a specific sum is fixed as the price of goods sold and delivered, or an agreed remuneration for work and services, a subsequent promise, without any *new* consideration, to pay an additional sum for the same work or the same services is a *nudum pactum*. (p)

A promise or agreement to make a duty of a limited nature more extensive, and to undertake a greater liability than is imposed by law upon the party making the promise, is a *nudum pactum*, unless there be some fresh consideration.

The promise of an executor or administrator, for example, to pay the debt of his testator or intestate, or of a husband to pay the debt of his wife incurred by her previous to the marriage, (q) does, in no degree, alter or extend their several liabilities. The executor in the first case does not render himself personally liable, but is only chargeable to the amount of his assets: and the husband, in the second case, cannot be sued alone, but must be sued jointly with his wife, just the same as if no such promise had been made.

Insufficient and nugatory considerations.—Neither “love and affection,” nor “friendship,” nor any mere moral duty or obligation, nor any voluntary courtesy, constitute a sufficient cause or consideration for the fulfilment by coercion of law of a simple contract or promise. (r)

The moral obligation which a parent is under to provide for his child, imposes on him no liability to pay the debts incurred by the child, and he cannot be made liable in respect thereof, unless he has given the child authority to incur them, or has contracted to pay them. (s)

Very slight evidence has, however, been held sufficient, under certain circumstances, to warrant a jury in inferring the existence of an authority from the parent, so as to fasten a just liability upon the latter. (t)

The mere putting an end to “certain disputes and controversies,” is an insufficient consideration or foundation in law for an express promise.

Thus, in an action of assumpsit, the declaration stated that disputes

(o) *Binnington v. Wallis*, 4 B. & Ald., 650. *Parke, B., Jennings v. Brown*, 9 M. & W. 501.

(p) *Harris v. Watson*, Peake R. 102. *Brown v. Crump*, 1 Marsh, 567. *Newman v. Walters*, 3 B. & P. 612.

(q) *Pearson v. Henry*, 5 T. R. 6. *Rann v. Hughes*, 7 T. R. 350, n. *Mitchinson v. Hewson*, ib. 348.

(r) *Harford v. Gardiner*, 2 Leon. 30. *Holaday v. Atkinson*, 5 B. & C. 501; 8 D. & R.

163. *Cluff v. Moore*, 1 Sid. 413. *Lamplough v. Braithwaite*, Hob. 105, post. p. 81.

(s) *Mortimore v. Wright*, 6 M. & W. 432. *Seaborne v. Maddy*, 9 C. & P. 497. *Urmston v. Newcomen*, 4 Ad. & E. 899; 6 N. & M. 454, s. c.

(t) *Law v. Wilkin*, 6 Ad. & E. 718; 1 N. & P. 697, s. c. *Baker v. Keen*, 2 Stark, 501. *Blackburn v. Mackey*, 1 C. & P. 1. *Nichols v. Allen*, 3 C. & P. 36.

and controversies were pending between the plaintiff and defendant, as to whether or not the defendant was indebted to the plaintiff in a certain sum of money, and thereupon, in consideration that the plaintiff would then promise the defendant not to sue him at any time for the recovery of the sum so in dispute between them, and would accept from the defendant a smaller sum in satisfaction and discharge of the same, the defendant promised the plaintiff to pay him the smaller sum within a reasonable time, and it was held that the declaration was bad, as not showing a sufficient consideration for the promise. "All that is stated," observes Lord Abinger, C.B., "is, that disputes and controversies were pending, as to whether or not the defendant was indebted to the plaintiff in a certain sum of money. . . . the mere existence of a dispute forms no consideration for a promise." (u)

The performance of an act which the party is under a legal obligation to perform, cannot constitute a good consideration for a promise.

"If," for example, "a debtor, being bound by law to give up the title deeds of an estate to a purchaser, pursuant to a decree of sale, enters into an agreement with the purchaser to deliver them to him on payment of a sum of money, the debtor is not only without any right of action for enforcing such an agreement, but if the money is paid, he is himself subject to an action for the recovery of it back.(x) So, if a debt is released or discharged, the giving up of a deed or collateral security originally deposited with the creditor to secure the payment of the debt cannot form a good consideration for a promise, for, by the release of the debt, the security is released, and the creditor is no longer justified in retaining it. (y) If a debtor, by paying part of his debt, obtains from his creditor an agreement to discharge the residue, such an agreement is *nudum pactum*, and totally inoperative, (z) unless the debt be unliquidated, or some *doubt* exists as to the exact amount due, (a) because the debtor is under a legal obligation to pay the whole demand.

A promise to pay money to a sheriff in consideration of his executing a writ, is also *nudum pactum*, and so, also, is a promise to pay money to a witness regularly subpoenaed to give evidence at a trial, as a compensation for his loss of time; because, in each and all these cases, the parties are bound by law to do the acts in question, without compensation or reward.(b)

(u) *Edwards v. Baugh*, 12 Law, J. Rep. N. S. (Exch.) 427; 11 M. & W. 641, s. c. *Kaye v. Dutton*, 13 Law, J. Rep. N. S. (C. P.) 186.

(x) *Pothier by Evans*, p. 25.

(y) *Cowper v. Green*, 7 M. & W. 641.

(z) *Cumber v. Wane*, 1 Str. 425. *Pinnell's*

case, 5 Co. 117, s. *Fitch v. Sutton*, 5 East 232.

(a) *Wilkinson v. Byers*, 1 Ad. & R. 113, post. p. 32. 1 Smith's Leading Cases, p. 147. *Jones v. Waite*, 5 Bing. N. C. 351, 356.

(b) *Bridge v. Cage*, Cro. Jac. 103. *Willis v.*

It has been held that a promise to pay money to the crew of a vessel, as an incitement to exertion, during a storm, is a *nudum pactum*, and cannot be enforced, because the sailor is bound to do his utmost to save and preserve the vessel, (c) but, if any extraordinary and additional services have been rendered beyond what the parties were in strictness bound to perform, there is a sufficient foundation for the promise, and the law will compel its faithful performance. (d)

A *by-gone transaction* cannot be made a good consideration for a promise.

A servant, whilst in the execution of his master's business, being arrested on a charge of trespass, and imprisoned in the Compter of London, two citizens, friends of the master, became bail for the servant, in order that the business of the master might not go undone, and the master afterwards, in return for the friendly act so done by them, promised to indemnify them against any loss they might incur by reason thereof. The servant was subsequently condemned in a penalty and costs, and the bail were compelled to pay the amount, whereupon they brought an action against the master upon the promise, and obtained a verdict; but it was holden, in arrest of judgment, that the promise was a *nudum pactum*, because the bailment, which was the consideration for it, was past and executed before the promise was made, and the promise, consequently, could not be said to have been founded upon it. (e)

So, in all pleadings, if the consideration be stated in the past tense, as a *by-gone transaction*, at the time of the making of the promise, it will fail to support the promise.

A promise, for example, to pay the plaintiff 20*l.*, in consideration that the plaintiff *had delivered* to the defendant twenty sheep, or a promise to lend the plaintiff 20*l.*, in consideration that the plaintiff *had formerly lent* that sum to the defendant, is a *nudum pactum*, and incapable of sustaining an action. (f) And so is a promise to pay the plaintiff 140*l.*, in consideration that the plaintiff *had expended* that amount in the maintenance and education of the defendant, and in the management and improvement of his estate, and in the payment of the interest of

Peckham, 4 Moore 300. *Collins v. Godfrey*, 1 B. & Ad. 956, 957. *Dixon v. Adams*, Cro. Eliz. 538. *Kaye v. Dutton*, 13 Law, J. Rep. N. S. (C. P.) 186, Parke, B. *Jackson v. Cobbin*, 8 M. & W. 797.

(c) *Harris v. Watson*, Peake 102. *Stilk v. Myrick*, 2 Campb. 817; 6 Esp. 129, s. c. *Newman v. Walters*, 3 B. & P. 615.

(d) *England v. Davidson*, post p. 29 n. (g).

(e) *Hunt v. Bats*, Dyer 272, a; 1 Roll. Abr. 11. *Hayes v. Warren*, 2 Str. 933. *Roscoria v. Thomas*, 3 Ad. & B. N. S. 234.

(f) *Jeremy v. Goochman*, Cro. Eliz. 442. *Doggett v. Vowel*, Moore 643. *Ib.* 220. Bacon's Abr. Assumpsit, D. *Raites v. Todd*, 3 Ad. & B. 856-7; 1 P. & D. 145, s. c.

a mortgage on it during the defendant's minority; (g) for the thing having been done and executed before the promise was made, cannot be said to be a consideration for it; but if the act has been performed pursuant to the previous *request* of the party making the promise, then the promise is coupled to the consideration by the request, and is not a *nudum pactum*. And when the defendant has received and retains the benefit of the consideration, the law will *imply* a request, or permit the jury to *infer* it, for the purpose of enforcing a meritorious claim, as will hereafter be shown, (h) but its existence *in law* is always essential, and must be stated as a fact on the face of the pleadings in order to support the promise declared upon.

Illegal and void considerations.—So, where the cause or consideration is repugnant to justice or morality, or is “against the intendment,” or contrary to the policy of the common law, (i) or against the provisions of an act of parliament, it will fail to support the contract or promise. As if it tend to defraud the public revenue, or to injure the public service, or facilitate smuggling, or promote vice, or to contravene the policy of the bankrupt and insolvent laws, or restrain trade and commerce, or marriage, (k) for no court will lend its aid or assistance to a man, as previously mentioned, in the performance of an act which is against the interests of society, or is either *malum in se*, or *malum prohibitum*. (l) An agreement, therefore, to pay money to stop a prosecution for crime, or to compound a felony, or abandon a petition presented to the House of Commons against the return of a member on account of bribery, is illegal and cannot be enforced in a court of law. (m)

If any part of the consideration for the contract be illegal, it vitiates the whole; (n) but if it be void merely, and not either *malum prohibitum* or *malum in se*, the contract may be supported by the *residue* of the consideration, if it be good *per se* and divisible. (o)

Failure of the consideration.—And although there be an apparent consideration for the promise, yet if this consideration should turn out to be

(g) *Eastwood v. Kenyon*, 11 Ad. & E. 451; 3 F. & D. 276, s. c. *Kaye v. Dutton*, 13 Law J. Rep. N. S. C. P. 186.

(h) Post. p. 29, 30.

(i) *Smith & Smith's case*, 3 Leon. 88.

(k) *Cockshott v. Bennett*, 2. T. R. 763. *Jackson v. Duchaire*, 3 T. R. 551. *Nerot v. Wallace*, ib. 17. *Waymell v. Read*, 5 T. R. 599. *Low v. Peers*, 4 Burr, 2224. *Lacausade v. White*, 7 T. R. 535. *Parsons v. Thompson*, 1 H. B. 322; 2 Wm. Saund. 137, h. ed. 1845. *M'Kinnell v. Robinson*, 3 M. & W. 434.

(l) *Lightfoot v. Tenant*, 1 B. & P. 555; Co. Litt. 206, b.

(m) *Coppock v. Bower*, 4 M. & W. 361.

(n) *Tindal, C. J., Waite v. Jones*, 1 Sc. 735; 1 Bing. N. S. 662. *Shackell v. Rosier*, 3 Sc. 74. *The King v. Northwingfield*, 1 B. & Ad. 915

(o) *King v. Sears*, 2 C. M. & R. 48; 5 Bing. N. S. 341, s. c. *Jones v. Waite*, 7 Sc. 317. *Sheerman v. Thompson*, 11 Ad. & E. 1027.

false, or to be a nullity, the contract has no legal force or effect, as in the instance put by Pothier. "If upon the false supposition that I owe you 1,000*l.*, left you by the will of my father, which has been revoked by a codicil, whereof I am not apprized, I engage to give you a certain estate in discharge of that legacy, the contract is null, and the falseness of the cause being discovered, you are not only without any right of action to compel me to deliver the estate, but even if I have delivered it, I am entitled to reclaim it, and my right of action by the Roman law was called *condictio sine causâ*, which is the subject of a title in the digest." (p) So if the consideration prove to be a nullity, the promise founded upon it is void, as if the consideration be the forbearance of a suit when there is no cause of action, or the relinquishment of a contract void in law, or a discharge from an arrest wrongfully and illegally made, or a promise to pay a debt which never had an existence in point of law. (q)

Simple contracts in writing.—No superiority was given by the civil law to a written contract over a contract by word of mouth. Although put into writing, the gratuitous promise was a *nudum pactum*, and incapable of sustaining an action, "for writing cannot change the nature of it, neither can writing amount to a *cause or consideration* for the promise, but it is only made use of for *proof*." (r) And so by the common law of England, it is holden that the mere reduction of the contract or promise into writing can give no right of action where none before existed. "The circumstance of the contract or promise being put into writing," observes Skinner, C. B., "does not take away the necessity of a consideration and obviate the objection of *nudum pactum*. There is no such third class of contracts, as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialties, (i. e. contracts under seal,) they are parol, and a consideration must be proved. (s)

Thus, where the defendant had signed a written agreement to the following effect, "I hereby agree to remain with Mrs. Lees, of 302, Regent Street, Portland Place, for two years from the date hereof, for the purpose of learning the business of a dress-maker, &c. As witness my hand, this 5th day of June, 1826," it was held, that as the agreement was all on one side, nothing being contracted to be done or performed by Mrs. Lees as

(p) Pothier on Obligations, P. 1. c. 1. Art. 3, § 6.

(q) Rooyer v. Langdale, Sty. 248; Jones v. Ashburnham, 4 East, 463; Brealey v. Andrew, 2 N. & P. 114; 7 Ad. & E. 108. s. c.; Hammon v. Roll, March, 202; Atkinson v. Settree, Willes,

482; King v. Hobbs, Yelv. 26; Randal v. Harvey, Godb. 358; Courtney v. Strong, 2 Ld. Raym. 1217; Luxton v. Robinson, Doug. 620.

(r) Dig. lib. 2. tit. 14. 7; lib. 44. tit. 7. 61; lib. 22. tit. 4. 4. Cod. 4, tit. 30.

(s) Rann v. Hughes, 7 T. R. 350, 351 n.

a consideration or inducement for the defendant's remaining two years in her service, it was a *nudum pactum*; and that no action, consequently, could be brought upon it against the defendant for leaving her mistress, and commencing business on her own account before the expiration of the two years. (t)

So, where the written agreement was in the following terms, "Memorandum of an agreement made the 17th of August, 1833, by which I, William Bradley, of Sheffield, do agree that I will work for and with John Sykes, of Sheffield aforesaid, manufacturer of powder-flasks and other articles, at and in such work as he shall order and direct, and no other person whatsoever, from this day henceforth, during and until the expiration of twelve months, and so on from twelve months' end to twelve months' end, until I shall give the said John Sykes twelve months' notice in writing that I shall quit his service," it was held, that as this engagement was entirely unilateral, and nothing was to be given or done by John Sykes as a consideration for Bradley's promise to work for him by the year and no one else, the agreement was a *nudum pactum*, and could not be enforced. (u) So where the defendant signed the following instrument, "Mr. James —, as you have a claim on my brother for 5*l.* 17*s.* 9*d.*, for boots and shoes, I hereby undertake to pay the amount within six weeks from this date, 14th January, 1833," it was held, that the promise being without consideration, was a *nudum pactum*, and gave no cause of action. (x)

And so with regard to bills of exchange and promissory notes, there must be a consideration to support them and give them legal validity, or they cannot be enforced by compulsion of law. (y) Inasmuch, however, as these instruments are negotiable, and the right of action upon them transferable from one person to another, the absence of an original consideration is perfectly immaterial when the bill or note has been negotiated, and the interests of third parties are involved in its efficacy. If there is consideration as between the immediate parties suing and being sued, that is sufficient to support the action. When a negotiable note, or a bill of exchange, for example, has come into the hands of a third person, who has given value for the instrument *bonâ fide*, and without notice of the want of consideration for originally giving or indorsing it, such want of consideration cannot be set up as a defence by the maker of the note or the acceptor of the bill, to the action by the indorsee or other *bonâ fide*

(t) *Lees v. Whitcomb*, 2 M. & P. 86; 5 Bing. 34. s. c.

(u) *Sykes v. Dixon*, 9 Ad. & E. 693; 1 P. & D. 463, s. c.; *Bates v. Cort*, 3 D. & R. 676.

(x) *James v. Williams*, 5 B. & Ad. 1109; 2 Dowl. P. C. 481. s. c.

(y) *Carstairs v. Rolleston*, 5 Taunt. 553; *Holliday v. Atkinson*, 3 D. & R. 163; 5 B. & C. 503, s. c.

holder. It is essential to the negotiability of such commercial instruments that the *bonâ fide* holder should not be bound to inquire into the original consideration. If he has advanced his money, or parted with property on the credit of the bill, or on the faith of the written promise, and has sustained damage and loss by reason thereof, there is a consideration moving from him capable of sustaining his action, although there may have been no consideration originally for the making or the giving of the instrument.

SECTION II.

WHAT AMOUNTS TO A VALID CONSIDERATION IN THE EYE OF THE LAW.

By the civil law, if any one agreed to perform or effect anything, (whether that consisted in giving or doing something, or omitting or withholding something,) *hoc animo* that another in his turn should do something, or give or deliver something, or *vice versâ*, the person in whose favour the thing executed was delivered or done, was not permitted to be deficient in performing what was stipulated on his part, but was compelled to performance, so that if there was a cause or consideration *facti vel traditionis*, a corresponding obligation or duty arose. And so, by the common law of England, if anything is performed which the party is under no legal obligation to perform, or if anything is given or done, as the consideration or inducement for the promise whereby the promisor or party making the promise has obtained or secured for himself some benefit or advantage, or whereby the promisee or party to whom the promise has been made has sustained some trouble or loss, or suffered some injury or inconvenience, there is a sufficient consideration to render the promise obligatory in law, and capable of sustaining an action.

Works and services.—Thus, where the defendant, in consideration that the plaintiff, at the request of the defendant, would give up to the defendant a certain letter belonging to the plaintiff, for the purpose of enabling the defendant to prosecute certain claims in Portugal, promised the plaintiff to give him 1,000*l.*, and the plaintiff confiding in this promise, gave up the letter, and enabled the defendant by means thereof to recover a large sum of money, it was held that the service so rendered to the defendant by the plaintiff was a sufficient consideration for the promise, and that the plain-

tiff, consequently, was entitled to recover the 1,000*l.*; (a) and the mere surrender and delivery of a letter or other written document, which the party has a right to keep and retain in his possession, is a sufficient consideration for the promise, although the possession of it may turn out eventually to be of no value in a pecuniary point of view, or no benefit may have resulted to the one party, nor prejudice to the other, from the surrender and delivery of the document. "If the plaintiff has been induced by the defendant's promise to part with something which he might have kept, and the defendant obtained what he desired by means of that promise, both being free and able to judge for themselves, the defendant is not justified in breaking this promise by discovering afterwards that the thing in consideration of which he gave it, did not possess that value which he supposed to belong to it. It cannot be ascertained that that value was what he most regarded, he may have had other objects and motives; and of their weight he was the best and only judge." . . . "The actual surrender of the possession of the paper to the defendant is a sufficient consideration, without reference to its contents." (b)

"A consideration of loss or inconvenience," observes Lord Ellenborough, "sustained by one party at the request of another, is as good a consideration in law for a promise by such other, as a consideration of profit or convenience to himself." (c)

"It is sufficient if there be any *damage* or *detriment* to the plaintiff, though no actual *benefit* accrue to the party undertaking. (d) If the plaintiff has become security for the promisor, or has accepted bills, or imposed upon himself any legal liability at the request of the latter, there is a sufficient consideration to support a promise and render it binding in law, although no actual benefit or advantage has resulted to the promisor. (e) Any trouble or labour too, however slight, undertaken by the plaintiff, at the request of the defendant, will support a promise by the latter, and render it binding, although such trouble and labour may have been unsuccessful and productive of no benefit or advantage to the plaintiff. (f)

In an action of *assumpsit*, it appeared that the defendant had offered a reward to whoever would give such information as would lead to the con-

(a) *Wilkinson v. Oliveira*, 1 Bing. N.S. 490; 1 Scott, 461. s. c.

(b) *Denman, C. J., Haigh v. Brooks*, 10 Ad. & E. 320; Lord Abinger, s. c. in error, ib. 334; 2 P. & D. 477; 4 P. & D. 288. s. c.; *Thomas v. Thomas*, 2 Gale & Dav. 226.

(c) *Bunn v. Guy*, 4 East, 194; Buller, J., *Nerot v. Wallace*, 3 T. R. 24.

(d) *Le Blanc, J., Jones v. Ashburnham*, 4 East, 466.

(e) *Ikin v. Brook*, 1 B. & Ad. 124; *Bailey v. Croft*, 4 Taunt. 611; *Williamson v. Clements*, 1 Taunt. 523; *Clutterbuck v. Coffin*, 4 Sc. N. R. 509; *Jones v. Waite*, 5 Sc. N. R. 951.

(f) *Sturbyn v. Albany*, Cro. Eliz. 67; *March v. Culpepper*, Cro. Car. 70.

viction of a felon, that the plaintiff had procured and given the required information, and had then sued the defendant upon his promise; and it was held that the service so rendered was a sufficient consideration for the promise, and that the plaintiff was entitled to recover the reward offered, although he was a constable and police officer of the district where the felony was committed, and it was his duty as such constable to do his utmost to discover and apprehend felons. (*g*)

Work and services rendered to a third party at the request of the promisor.—Any service, benefit, or advantage, also rendered to a third person at the request of the promisor, is a sufficient consideration for the promise. As if one person should say to another, "heal such a poor man of his disease," or "make an highway," and I will give thee so much, and he doeth it, an action lieth at the common law. (*h*) A captain of a company of foot soldiers, at the request of the defendant, gave leave of absence to a soldier on the faith of a promise by the defendant that the soldier should return in ten days, or that the defendant would pay the captain 20*l.*, and it was held that the leave of absence so given was a sufficient consideration for the defendant's promise, and that the captain, consequently, was entitled to maintain an action for a breach thereof. (*i*) So where the defendant promised the plaintiff to pay him 100*l.* if the plaintiff would bail the defendant's servant, who had been cast into prison, it was holden that there was a sufficient consideration for the promise. (*k*)

Very slight circumstances also will in certain cases suffice to establish a request in point of law.

If a tailor furnishes clothes to a boy at school, and the father sees the clothes on the boy's return home, and makes no objection to the tailor, this is sufficient to warrant a jury in finding that there was an implied authority from the father to the tailor to furnish the son with clothes. (*l*)

The father of an illegitimate child promised to pay the mother an allowance of 60*l.* a year during her life, in consideration that the mother had at his request undertaken, and then had the care and nurture of the child, and would thenceforth continue to take charge thereof; and it was held that there was a sufficient consideration for the promise, and that the executors of the father, after the decease of the latter, were bound to continue the payment of 60*l.* a year to the mother. (*m*)

A *bygone act or service* (*n*) performed or rendered pursuant to *the previous request* of the promisor, will be sufficient to sustain an action.

(*g*) *England v. Davidson*, 11 Ad. & E. 856.

(*h*) 1 *Rolle Abr* Action sur Case.

(*i*) *Taylor v. Jones*, 1 Raym. 312.

(*k*) *Hunt v. Bate*, Dyer, 272 a.

(*l*) *Law v. Wilkin*, 6 Ad. & E. 718.

(*m*) *Jennings v. Brown*, 9 M. & W. 496.

(*n*) *Ante*, p. 23; 1 Wms. Saund. 264. 264 a.

Thus, where the plaintiff brought his action upon a promise made by the defendant to pay the plaintiff 20*l.* in consideration that the plaintiff, *at the special instance* of the defendant, *had taken* to wife the cousin of the defendant, it was holden that the action was maintainable, although the marriage was executed and past before the undertaking and promise were made, because the marriage ensued *at the request* of the defendant. (*o*) So, where the plaintiff having feloniously slain one Patrick Mahume, "*required*" the defendant to endeavour to obtain a pardon for him from the king, and the defendant journeyed and laboured, at his own charges and by every means in his power, to effect the desired object, and the defendant *afterwards*, in consideration of the premises, promised to give the plaintiff 100*l.*, it was held that although the consideration was passed and gone before the promise was made, yet inasmuch as the consideration "*was moved by the previous suit or request of the party*," the promise was binding and capable of sustaining an action. (*p*) But the thing done must of course have been advantageous to the defendant, or detrimental or troublesome or inconvenient to the plaintiff, and must be such an act or service as the law recognises as a good legal consideration for a promise. (*q*)

And if the defendant has accepted and retains the benefit or advantage of the consideration, the law will *imply* a request where none exists in point of *fact*. Thus, if a man pays a sum of money, or buys goods for me without my knowledge or request, and afterwards I agree to the payment or receive the goods, this subsequent assent is equivalent to a previous request, in accordance with the ancient maxim of the civil law, *omnis ratihabitio retrotrahitur et mandato equiparatur*. In such a case it must be stated upon the face of the plaintiff's declaration, "that the money was paid and laid out for me at my special instance and request, and my subsequent conduct in agreeing to it will be evidence of that request." (*r*)

A request too is frequently implied by law for the purpose of enabling a man to enforce an express promise founded upon a meritorious claim not amounting to a strict legal right. If a man, for example, clothes, feeds, and educates an infant during his infancy, and the latter after he comes of age makes an express promise to his benefactor to pay him a certain sum of money in consideration of the benefits so rendered, the law

(*o*) Dyer, 272 (b).

(*p*) *Lampleigh v. Braithwaite*, Hob. 105; *Smith's Leading Cases*, 67, 68; *Sidnam v. Worthington*, Cro. Eliz. 42; *Harris's case*, Dyer, 272 a. n. 31.

(*q*) *Kaye v. Dutton*, 13 Law, J. Rep. n. s. (C. P.) 187.

(*r*) 1 Saund. 264. n. 1; Tindal, C. J., *Tipper v. Bicknell*, 4 Scott, 462; 3 Bing. n. s. 715. See post. ch. 7, as to implications of law.

will imply a previous request (s) on the part of the infant, for the supply of the necessities of life so furnished. Hence it has been said that the existence of a *moral* duty or obligation to do a particular thing, is a sufficient consideration for an express promise to perform it. But this is not true as a general proposition in point of law.

The only duties of the nature of mere moral obligations that will support an express promise, are those which could be enforced at common law, but for the intervention of some positive rule of law or statutory enactment, which, with a view to general benefit, exempts the party in that particular instance from liability. Such are the duties and obligations arising out of the debts and contracts of persons under age, or the debts and contracts of certificated bankrupts, or antiquated legal claims and demands barred by the statute of limitations, where the remedy is taken away by a positive rule of law, or by express legislative enactment, and the payment of the debt, or the performance of the engagement, remains a voluntary duty, binding only *in foro conscientie*. In these instances, and upon such duties and obligations so exempted, an express promise operates to revive the liability and take away the exemption.

The express promise of a person of full age, founded upon the precedent duty or obligation contracted during infancy, operates as a waiver of the rule of law framed for the protection of infants, and forthwith renders the party legally liable upon the precedent obligation. And the certificated bankrupt, or the person exempted from liability by the statute of limitations, who makes an express promise founded upon the precedent duty, at once waives the statutory bar and restores his liability. (z) The express promise in these cases revives a precedent good consideration, but it can give no original right of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statutory provision. (u)

Past seduction and past cohabitation, consequently, are not a sufficient consideration to support an express promise to pay an annuity to the injured female. (x)

Any suspension or forbearance of a man's legal rights, also, will form a foundation for an undertaking, and will make it binding, though no actual benefit accrue to the party undertaking. (y) If the plaintiff, for example, at the request of the defendant, forbears to institute legal pro-

(s) *Ellenborough, C. J., Cooper v. Martin*, 4 East, 81.

(t) But the promise must be made in writing, 9 Geo. 4. c. 14. post. ch. 4.

(u) *Wennall v. Adney*, 3 B. & P. 249. n. (a).

Eastwood v. Kenyon, 11 Ad. & E. 447.

(x) *Binnington v. Wallis*, 4 B. & Ald. 650.

(y) *Yates, J., Pillans v. Van Mierop*, cited 4 East, 460; *Serle v. Waterworth*, 4 M. & W. 13.

ceedings, or discontinues legal proceedings already commenced against a third party, for any convenient or reasonable period, for the enforcement of a just claim or demand, (2) or suspends or withdraws an execution or a distress against the goods or the person of such third party, the suspension or withdrawal of such execution or distress, and the forbearance of further proceedings, form a sufficient consideration for a promise by the defendants to pay money to the plaintiff, or to satisfy the full amount of his claim. (a)

The abandonment and discontinuance of an action brought to enforce a *doubtful* right or claim, too, is a sufficient consideration for a promise; (b) and if there be an admitted debt due from one person to another, but disputes and doubts exist as to the exact amount due, the compromise and settlement of the disputes, and the abandonment of the claim to its full extent, form a sufficient consideration for a promise to pay a smaller sum than the amount claimed; (c) and in the case of all unliquidated claims and demands, where the precise amount due has not been fixed and reduced to a certainty by the agreement of the parties, the payment or satisfaction of *part* of the demand is a good consideration for the discharge of the *residue*. (d)

Trust and confidence.—If a man is entrusted with money or goods on the faith of a promise to deal with them in a particular manner, an action can be maintained against him for any loss or injury that may be sustained by reason of a breach of the promise, although the duty or office of trust may have been undertaken gratuitously. “If I promise another to keep him such certain goods safely for such a time, and after *I refuse to take them*, there lieth no action against me for it. But *if I take them*, and afterwards they be lost or impaired through my negligent keeping, there an action lieth.” (e)—“The bare being trusted with another man’s goods,” observes Lord Holt, “is a sufficient consideration if the bailee *enter upon the trust and take possession*.” (f) Thus, where a coffee-house keeper accepted a large sum of money from the plaintiff, and promised to take proper care of it for a certain period, it was holden that an action would

(a) *Smith v. Algar*, 1 B. & Ad. 603.

(b) 1 Roll. Abr. 24, pl. 33. *Jennings v. Harley*, Cro. Eliz. 909. Yelv. 19, s. c.; *Morton v. Burn*, 7 Ad. & E. 19, 2 N. & P. 297; *Skate v. Beale*, 11 Ad. & E. 983; *Atlee v. Backhouse*, 3 M. & W. 651; *Harper v. Williams*, 4 Ad. & E. N.S. 219, 233. A promise, however, to pay the debt of a third party, and the consideration for the promise, must be expressed in writing. See post, ch. 4.

(c) *Longridge v. Dorville*, 5 B. & Ald. 117;

Stracy v. Bank of England, 4 M. & P. 639.

(d) *Edwards v. Baugh*, 11 M. & W. 641. 12 Law J. Rep. N.S. Exch. 427.

(e) *Wilkinson v. Byers*, 1 Ad. & E. 113, 3 N. & M. 853, s. c.; *Watters v. Smith*, 2 B. & Ad. 889.

(f) Doctor and Student, Dial. 2, C. 24. Story, J., on Bailments.

(g) Holt, C. J. *Coggs v. Bernard*, 2 Ld. Raym. 920.

lie on this promise for gross neglect and want of caution, whereby the money was lost. (g)

So where the plaintiff delivered the sum of 700*l.* to the defendant, to be laid out by him in the purchase of an annuity, and the defendant promised to get the annuity *well* and *properly secured*, but was guilty of gross neglect and want of care, whereby both the money and the annuity were lost, it was holden that the plaintiff was entitled to maintain an action against the defendant, to recover compensation for the injury he had sustained, although the defendant was to receive *no reward* for his services. (h) So again, where the plaintiff being about to proceed to Northampton, delivered money to the defendants in London to be forwarded to him at Northampton, and the defendants accepted the money, and promised to fulfil the directions given, it was holden that the plaintiff was entitled to maintain an action in respect of the injury and inconvenience he had sustained by reason of a breach of this promise, although the defendants were to receive *no remuneration* for their trouble. (i) And where the plaintiff intrusted "divers boilers of great value" to the defendant, to be weighed, and the defendants promised to return them in the same state and condition as they were in at the time he received them, but sent them back in detached pieces and unfit for use, it was holden that the plaintiff was entitled to maintain an action on the promise, to recover compensation for the injury he had sustained." (k)

Mutuality of Contract and Obligation.—There is a large class of contracts, also, which being founded upon mutual promises, are perfected and made binding by the bare consent of the parties, the promise or undertaking of the one party to do one thing being the consideration for the promise of the other to do another. To these contracts, framed and constituted for the performance of mutual and reciprocal acts and duties, and founded upon a mutuality and reciprocity of obligation and liability, the objection of *nudum pactum* cannot apply. Such are all contracts of sale where the promise or undertaking of the one party to sell forms the consideration for the promise of the other to buy, and where "the bargain is struck," and the contract concluded, by the mere assent of the parties, neither of them being at liberty "to be off," provided possession of the subject matter of the sale be tendered by the seller within a reasonable

(g) *Doorman v. Jenkins*, 2 A.d. & E. 256.

(h) *Whitehead v. Greetham*, 10 Moore, 183, 2 Bing. 464; M'Clel. & Y. 205, s. c. In the absence of an express undertaking to procure good security, the party would only be bound to use reasonable care and caution. *Dartnall v.*

Howard, 6 D. & R. 443, 4 B. & C. 345, s. c.

(i) *Skillicoe v. Glyn*, 2 M. & W. 143; *Wheatley v. Low*, Cro. Jac. 668; Palm. 281.

(k) *Bainbridge v. Firmston*, 1 P. & D. 3; and see Smith's leading cases, vol. 1, p. 94, 95, ed. 1841.

period. (*l*) Such, also, are all contracts of marriage, where the promise of the one party to marry is the consideration for the promise of the other party; also all contracts or agreements to enter into partnership, or to make exchanges of lands and chattels, or to refer disputes to arbitration; (*m*) and whenever several parties simultaneously agree for the performance of several duties or services to or for the benefit of each other, there is a binding contract, and an action will lie. (*n*)

In the case of the contracts with the dress-maker and the powder-flask manufacturer, previously cited, (*o*) if Mrs. Lees, the dress-maker, had engaged to *teach* the defendant the art of dress-making, or John Sykes, the flask-manufacturer, had bound himself to employ Bradley his workman by the year, there would have been a sufficient consideration for their several promises to remain in the service of their employers for the time specified.

So in the case of the boot-maker, if the latter had undertaken not to sue the defendant's brother for the 5*l.* 17*s.* 9*d.* for the space of six weeks, that would have been a sufficient consideration for the defendant's promise to pay and satisfy the amount of his claim.

Mutual Promises.—All contracts founded upon mutual promises between persons of full age, must become obligatory upon both parties at the same instant, (*p*) so that each may have an action upon it, or it will bind neither; if one only is bound, there is no consideration for the promise of the other, and such promise is consequently *nudum pactum*. A written agreement, consequently, to submit disputes and differences to arbitration, must be signed by all parties before any one can be made liable upon it, as the obligation by all to obey the award of the arbitrator is the consideration to each for his entering into the contract. Before a plaintiff, therefore, can succeed in an action upon such a contract, he must show that he had himself engaged to be bound by the award. (*q*) The mutuality of obligation is the very essence of all contracts founded upon mutual promises. "Hence it follows," observes Pothier, "that nothing can be more contradictory to such an obligation than an entire liberty in either of the parties making the promise to perform it or not, as he may please. An agree-

(*l*) 2 Black. Com. 447; Noy's Maxims, c. 42; Justiniani Institut. lib. iii. tit. 23; and see post, ch. 3, p. 40, on the Contract of Sale.

(*m*) *Gover v. Copper*, Cro. Eliz. 543; ib. 703, 888; *Manfield v. Stephen*, Comb. 256; *Hedder v. Rutter*, 1 Sid. 180; *Holder v. Dickeson*, 1 Freem. 95; *Gibbons v. Prewd.* Hardr. 102; *M'Neill v. Reid*, 2 M. & Sc. 89; 9 Bing. 68, a. c.

(*n*) *Tipper v. Bicknell*, 4 Sc. 462; 3 Bing. N. S. 710.

(*o*) Ante, p. 26.

(*p*) *Nichols v. Raynbred*, Hob. 88. See the exception in favour of infants, post, p. 36.

(*q*) *Kington v. Phelps*, Peake, B. 299; *Biddell v. Downe*, 6 B. & C. 255; 9 D. & R. 404, a. c. *Antram v. Chace*, 15 East, 212.

ment giving such a liberty would be absolutely void for want of obligation, (r) i. e. so long as the contract remained executory, and nothing had been done under it. But if the contract has been executed by the performance of the act forming the consideration for the promise, then it is no answer to an action to say that the plaintiff was not, by the terms of the original contract, *bound* to do the act, and that there was consequently no mutuality of obligation. (s)

There is a large class of contracts in which there is no mutuality of engagement or liability. In the preceding cases, for example, where the consideration for the promise made by the defendant was the giving up, or surrender of letters or securities, or the performance of work and labour, or the marrying the defendant's kinswoman, or the suspension or forbearance of legal proceedings, or the intrusting another with property, the plaintiff was not, by the terms of the original contract, bound to give up the letters, or perform the work, or marry the kinswoman, or suspend the legal proceedings, or intrust the party with property; but if, acting upon the faith of the promise made to him, he *did do so*, the promise attaches to the consideration so performed and accomplished, and the defendant is liable upon his promise.

When the defendant has had the benefit of the consideration for which he bargained, it is no answer to an action brought against him to say that the plaintiff was not bound by the contract to do the act. (t) Thus in the case of guarantees. "Suppose I say, if you will furnish goods to a third person, I will guarantee the payment; there you are *not bound to furnish them*; yet if you *do furnish them* in pursuance of the contract, you may sue me upon my guarantee." (u) "A great number of the cases on guarantees are cases of contracts not binding on both sides at the time when made, and in which the whole duty to be performed rests with one of the contracting parties. A guarantee falls under that class when a person says, 'In case you choose to employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time, and neglect to pay over to you,' the party indemnified is not therefore bound to employ the person designated by the guarantee; but if he does employ him, then the guarantee attaches and becomes binding on the party who gave it." (x)

(r) *Traité des Obligations*, part. i. ch. 1, art. 3, § 7. *Hopkins v. Logan*, 7 Dowl. 366; 5 M. & W. 241 s. c.

(s) *Fishmonger's Company v. Robertson*, 6 Sc. N.S. 56; 5 M. & Gr. 131, s. c.; *Arnold v. Mayor of Poole*, 5 ib. 776; 4 ib. 896.

(t) *Tindal, C. J.*, 6 Sc. N.S. 106.

(u) *Patteson, J.*, *Morton v. Burns*, 7 Ad. & E. 23.

(x) *Parke, B.*, *Kennaway v. Treleavan*, 5 M. & W. 501; *Mozley v. Tinkler*, 1 C. M. & B. 695.

But in these cases, and in all cases where there is no mutuality of contract and obligation, there is nothing to bind the party to the continuance of his promise, so long as nothing has been *done* upon the faith of it; and the party making the promise or giving the undertaking may, at any time before it has been accepted and acted upon, and any portion of the intended consideration has been accomplished, retract such promise or withdraw such undertaking, and place himself in the same situation as if it had never been made.

By the civil law, contracts between persons of full age and infants, formed an exception to the general rule, that both parties must be bound by an executory contract founded upon mutual promises, or neither party could be made liable upon it. This exception has been introduced into our own law as well as into the French law, (y) and other systems of jurisprudence, for the protection and benefit of minors. It is a principle of the common law, that if a contract has been entered into between an infant and a person of full age, the former may take advantage of his minority, and resist the completion of his contract; but that right cannot be urged by the other to show, that as there was not a mutual obligation, there was no consideration for his promise. (z) If a person of full age, for example, enter into a contract of marriage with a lady who is a minor, the latter may sue the former upon the contract, although she is not herself liable to an action for a breach of promise.

Of the assent of the parties.—As contracts founded upon mutual promises and a mutuality of obligation, are perfected and made binding by the bare consent of the parties, it becomes important to distinguish in what way and to what extent such assent must be manifested, and accurately to distinguish between mere offers and proposals by the one party, unaccepted and unapproved of by the other, and which may consequently be retracted and withdrawn, and mutual and positive engagements.

If the terms of a contract founded upon mutual promises have not been finally agreed upon, if either party withholds or has not given his full assent to them, the contract is incomplete; it binds neither of the parties, and can give rise to no cause of action. (a)

Offers of MARRIAGE.—A promise of marriage is not binding on the party making it, unless it has been accepted by the party to whom it is made, and a reciprocal and mutual engagement has thus been created, it amounts, so long as it remains unaccepted, to a mere proposal or offer,

(y) *Pothier. Traité des Obligations, part. 1, art. 4.*

(z) *Holt v. Ward Clarendieux, 2 Str. 938.*

(a) *Routledge v. Grant, 1 M. & P. 717; 4 Bing. 653, s. c.; Doe v. Cartwright, 3 B. & Ald. 327.*

which may be retracted at any time. (b) Before, therefore, the plaintiff can succeed in an action upon such a promise, it must be shown that he or she accepted the proposal, and so entered into a corresponding engagement; and this acceptance may be proved and established by the conduct and acts of the party, as well as by express words. (c)

Offers of sale and purchase not amounting to a complete and definite contract.—If an offer has been made by one man to sell goods to another, such offer is not, of course, binding until it has been formally accepted by the party to whom it has been made, as the one cannot be held liable to the other for not selling the goods, unless that other, by accepting the offer, has bound himself to purchase. Thus, where the defendant proposed to sell certain goods to the plaintiff at a fixed price, and gave him, at his request, a certain time to determine whether he would buy them or not, and the plaintiff, within the time determined to buy them, and gave notice thereof to the defendant, and offered to pay the price; but the latter receded from his offer, and refused to deliver the goods and accept the money: it was holden, in an action for the non-delivery of the goods, that there was no complete contract of sale; that as the defendant was not by the original contract bound to purchase, there was no consideration to bind the defendant to sell; that the engagement was all on one side, and was, therefore, *nudum pactum*. (d) But where the defendants wrote to the plaintiffs, making them an offer of a quantity of merchandise at a fixed price, they “*receiving an answer in course of post*,” and the defendants wrote accepting the offer; it was holden that there was a binding contract of sale the moment that the offer was accepted, and that the defendants were not at liberty to retract their offer before the arrival of the time for receiving the answer; that they must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract was completed by the acceptance of it by the latter, otherwise it was observed no contract could ever be completed by post. In this case the defendants had misdirected the letter, and sent it to a wrong county, and so caused a delay in its receipt, and in the return of the answer, and not having received the answer at the expected time, sold the merchandise to another person; and it was holden that as the delay had been occasioned by their own neglect, and not by any omission or default on the part of the plaintiff, that the answer must be taken to have

(b) *Cock v. Richards*, 10 Ves. 438; *Daniel v. Bowles*, 2 C. & P. 553.

(c) *Hutton v. Mansel*, 3 Salk. 16, 64; *Daniel*

(d) *Cooks v. Oxley*, 3 T. R. 653.

come back in due course of post, and that the defendants were liable upon the contract for the damage sustained by the plaintiff by reason of his loss of the bargain, and of the non-delivery of the goods. (e)

"In the contract of sale, as in other contracts," observes Pothier, "there may be consent of parties, not only between those who are present, but those who are absent, through the medium of letters, or by an agent. In order to constitute consent in this case, it is necessary that the intention of the party who writes to another to propose the bargain should continue until the letter reaches the other party, and he has an opportunity of accepting or rejecting the bargain." (f) But where the offer is not made through the medium of the post or an agent, and is not immediately accepted, but the party making the offer gives the other, at his request, a certain time to determine whether he will accept it or not, and promises to keep the offer open, and not enter into any contract with a third party until such answer and determination have been received; this is a mere *nudum pactum* or voluntary promise, which the party may abide by or withdraw at his pleasure or convenience; it is a promise binding, doubtless, in conscience and good faith; but has no legal force or validity, as the engagement is all on one side, and there is no consideration on the other to support it.

"There was a proposal by the defendant to take a lease from the plaintiff on certain terms. To this proposal the plaintiff was to give a definite answer within six weeks. Now I am of opinion that if six weeks are given by one party to accept an offer, the other has the same period to put an end to it. The contract must be mutual, and the one party cannot be bound without the other . . . until both parties have agreed to the terms proposed, either has a right to rescind or put an end to the contract." (g)

The intention of the party, therefore, making the proposal, and giving time for its acceptance, to adhere to this proposal, must continue down to the time that the acceptance is actually notified by him, (unless the proposal be communicated by post or through the medium of an agent,) and there must *then* be a mutual assent of both parties to the terms of the bargain, to constitute a contract binding in law, but the party is not bound to wait for the determination and acceptance of the other, although he has promised and engaged so to do.

If, however, anything has been given or done as the consideration for the promise, if the party to whom it is made has agreed to incur any

(e) *Adams v. Lindsell*, 1 B. & Ald. 681.

(g) *Best, C. J., Routledge v. Grant*, 1 M. &

(f) Pothier, *Contrat de Vente*, partie 1, art. 3. P. 731.

expense or labour in consideration of the offers being continued or kept open for a certain time, then the party making the offer is not at liberty to retract it.

Biddings at an auction.—A bidding at an auction is a mere offer which may be retracted at any time before the hammer is down and the offer has been accepted. In *Payne v. Cave*, (*h*) where the defendant had retracted his bidding at an auction, the court said, “The assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done till the defendant had retracted. An auction is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on the one side, which is not binding on the other side till it is assented to. But according to what is now contended for, one party would be bound by the offer and the other not, which never can be allowed.”

From the preceding remarks, it will at once be perceived that it is not essential in point of law that the consideration for a simple contract or promise should be adequate in point of value. “If there be *any* consideration, the court will not weigh the extent of it.” (*i*) It has no means of scrutinizing the varied hidden motives and reasons that may have influenced the parties at the time, and induced them to enter into the contract, nor can it determine upon the prudence or propriety of the transaction. If parties, therefore, choose to enter into unwise and improvident bargains, they must abide by the consequences of their own rashness and folly; (*k*) they have contracted for themselves, and the court cannot contract for them.

(*h*) 3 T. R. 148.

(*i*) *Ellenborough*, C. J., 16 East, 372; *Hitchcock v. Coker*, 6 Ad. & E. 457; *Starlyn v. Albany*, Cro. Eliz. 67, 2 H. Bl. 812; *Pinnell's case*, 5 Co. 117 a., 117 b.

(*k*) *Haigh v. Brooks*, 10 Ad. & E. 320;

Skeate v. Beale, 11 Ad. & E. 992; but the consideration must be of some value; *Smith v. Smith*, 3 Leon. 88; 1 Rol. Abr. 23.

CHAPTER III.

OF THE CONTRACT OF SALE, AND ITS REQUISITES, IN RESPECT OF AUTHENTICATION BY WRITING.

SECTION I.—*Executory contracts for the sale of goods and chattels*—Effect and operation of the contract at common law—When the acts of payment and delivery are concurrent and constitute mutual conditions—When the right of property and the risk of loss pass by the bargain, but not the right of possession—To what extent the contract must be completed to operate as a transfer of the right of property—Ascertainment of the subject matter and of the price—Contracts for the making or manufacture of goods and chattels—Of the time within which the contract of sale must be fulfilled—The transfer of the right of property and possession defeated by the fraud or deceit of the purchaser—The purchaser's right of possession divested by his bankruptcy or insolvency before actual payment—Stoppage in transitu—Effect of stoppage of part of goods sold under an entire contract—As to what is sufficient notice of a stoppage in transitu and the mode of giving it—Consummation of the contract of sale by actual delivery—Actual and constructive possession by the purchaser—Transfer by bill of lading—Transfer by delivery orders—When a sale by a bailee or wrongful possessor shall bind the true owner—Colourable sales to defraud creditors.

SECTION II.—*Authentication of the contract of sale by writing, when necessary*—Effect of the Statute of Frauds on executory contracts for the sale of goods and chattels—Its extension to contracts for the making and manufacture of goods and chattels—How far the contract must be executed, to be withdrawn from the operation of the statute—Acceptance and receipt of the thing sold within the meaning of the statute—Part acceptance and receipt—Earnest and part payment—What is a sufficient note or memorandum in writing of the contract.

SECTION I.

OF THE CONTRACT OF SALE.

Bargain and sale of goods and chattels.—The contract of sale is founded, as before mentioned, upon a mutuality of engagement, or upon mutual promises, the promise or undertaking of the one party to sell, being the consideration for the promise of the other to buy. It is perfected, consequently, by the bare consent of the parties, although the thing sold be not delivered nor the price paid. "It never depends on the seller to elude the effect of the sale, by refusing to make delivery of the thing

sold, provided the buyer performs his part of the contract. In the same manner, likewise, the purchaser cannot procure the sale to be annulled, by refusing to receive the goods and to pay the price." (a)

When the acts of payment and delivery are concurrent, and constitute mutual conditions.—If different times have not been appointed for delivery and payment, the acts are concurrent and constitute mutual conditions to be performed *at the same time*, so that the purchaser cannot in general demand the thing sold without paying or offering to pay the price, nor the vendor the price, without delivering or offering to deliver the subject matter of the sale. "If I sell you my horse for 10*l.*, if you will have the horse I must have the money, or if I will have the money you must have the horse." (b)

If, on the other hand, a precise time has been appointed for the payment of the price, and no time, or another and different time, is fixed for the delivery, the acts are not concurrent, and do not constitute mutual conditions. If one party has agreed to pay his money before he is to have the thing for which the money is to be paid, he must fulfil his engagement, however foolish and imprudent it may happen to be. As if A, by agreement, undertakes to pay 100*l.* for a horse purchased by him on the first of January, and B agrees to deliver the animal on the first of April following, here B may have an action against A for the money, without delivering or offering to deliver the horse, as his time was not then come. (c)

When the right of property and the risk of loss pass by the bargain, but not the right of possession.—When a bargain, properly authenticated, (d) is made for the purchase, at an agreed price, of specific goods, which have been selected and approved by the purchaser, and put into a deliverable state and placed at his disposal, the right of property forthwith passes to such purchaser; but, if the price is not paid, or part only of it has been paid, and credit has not been given, the right of possession continues in the vendor, until payment or tender of the whole, or of the rest of the purchase money, and this, whether part of the goods have been delivered to the purchaser, or the entire commodity remains in the hands of the vendor. (e) The goods in this case remain at the

(a) Domat's Civil Law, b. i. & ii. sect. 2, 3, xx. sect. 4, ix. Dallas, C. J. *Leigh v. Paterson*, 2 Moore, 591. *Philpots v. Evans*, 5 M. & W. 477. *Pothier*, Traité du Contrat de Vente, partie 1, art. 3.

(b) Holt, C. J., *Calonel v. Briggs*, 1 Salk 113. *Lock v. Wright*, 1 Str. 571; 8 Mod. 41, s. c. *Ughtred's case*, 7 Co. 10 b. *Wilmahurst v.*

Bowker, 3 Sc. N. S., 291, 292. *Withers v. Reynolds*, 2 B. & Ad. 882.

(c) *Thorpe v. Thorpe*, 1 Salk. 171; 1 Raym. 665 s. c. *Pettitt v. Mitchell*, 5 Sc. N. B. 721, post, ch. 6.

(d) See post, section 2, as to the authentication of the contract by writing.

(e) *Bloxam v. Saunders*, 7 D. & B. 405;

risk of the purchaser, and if they are burned, or destroyed by accident, before payment of the price, the loss is the loss of the purchaser, and he must pay his money, although he can never have the thing for which he agreed to pay it.

"If I sell my horse for a sum of money, I may keep him until I am paid, yet the property of the horse is, by the bargain, in the bargainor or buyer. But if he do presently tender me my money, and I do refuse it, he may take the horse or have an action of detainment, and if the horse die in my stable, between the bargain and the delivery, I may have an action of debt for my money, because, by the bargain, the property was in the buyer." (*f*)

By contract notes of purchase and sale the vendor agreed to sell and the purchaser to buy "a stack of hay standing in Canonbury Field, Islington, at the sum of 145*l.*, to be paid on the fourth of February next, the hay to be allowed to stand on the premises until the first of May next, *and not to be cut till paid for*;" and it was held that by this bargain there was an immediate transfer of the right of property to the purchaser, though the price was not to be paid or the hay cut until a future period, and the hay having been accidentally destroyed by fire, whilst it remained in the possession of the vendor, that the purchaser must bear the loss. (*g*) "The right of property and the right of possession are distinct," observe Bayley and Holroyd, Js. "The right of property may be in one person, and the right of possession in another. The vendor may have a lien upon the goods he has sold, a qualified right to retain possession of them until the price is paid,—while the property in them may be in the vendee. . . . It is a rule in every case of a sale of goods, that if nothing remains to be done on the part of the seller, as between him and the buyer, before the goods are to be delivered, the property in the goods passes immediately to the buyer, and the property in the price to the seller; but that if anything remains to be done on the part of the seller, the property does not pass until that has been done. In this case, therefore, I am of opinion, not only that the property in the hay passed immediately to the buyer by virtue of the contract, but also that the seller thereby immediately acquired a property in the price agreed to be paid for the hay, although the payment was not to be made, nor the hay to be cut, until a future period. Then the property in the hay having passed to the

4 B. & C. 948. *Simmons v. Swift*, 8 D. & R. 702; 5 B. & C. 362. *Clarke v. Spence*, 4 Ad. & E. 469. *Hansom v. Meyer*, 6 East, 625. *Dixon v. Yates*, 5 B. & Ad. 340. *Martindale v. Smith*, 1 Ad. & E., N. S. 395.

(*f*) *Noy's Maxims*, ch. 42, p. 88. Bro. Abr. Contr. pl. 26. Bayley, J., *Tarting v. Baxter*, 9 D. & R. 276. *Barr v. Gibson*, 3 M. & W. 390.

(*g*) *Tarting v. Baxter*, 9 D. & R. 272; 6 B. & C. s. c.

buyer, and the hay having been accidentally destroyed before the day of payment, the buyer must bear the loss."

A quantity of turpentine was sold by auction at a fixed price per cwt., to be delivered in casks, each cask to contain a certain quantity, to be filled up by the vendor and removed by the purchaser; all the casks were filled up, except ten, and were placed in the defendant's warehouse, at the disposal of the purchaser. Before they were removed, the whole quantity was consumed by fire, and it was held that the right of property in the casks which had been filled up and placed at the disposal of the purchaser, had passed to the latter, and that he must stand to the loss; but as to the remaining quantity, which had not been selected and weighed and made ready for delivery, that it continued in the vendor, and at his risk. (i) And the right of property and the attendant risk may be transferred by the buyer to a third party by another contract of sale, although the price may not have been paid and the right of possession divested out of the original vendor. (k)

To what extent the contract must be completed to operate as a transfer of the right of property.

But the right of property does not pass so as to subject the purchaser to all future risks, unless both the precise thing sold and the price to be paid for it, have been clearly and distinctly ascertained.

Ascertainment of the subject matter of the sale.—If anything, for example, remains to be done for the purpose of ascertaining the quantity, or the identity and individuality of the thing sold, such as measurement or weighing, or the selection and separation of the article from a mass of the commodity in bulk, or from a number of articles of a similar character and description, the right of property and the risk are not transferred to the purchaser until such selection and separation have been made, and the precise thing to be delivered has been ascertained and tendered to the purchaser, or, if it was to be fetched away by the latter, until it has been set apart and notice has been given him that it is ready for delivery. (l) Thus, by the sale of a horse generally at a fixed price, no right of property in any particular horse can vest in the purchaser until the animal has been selected and identified and tendered to the buyer, or, in case it was to be fetched away by the latter, until it has been selected and set apart for him, and notice has been given him that the animal is at his disposal, and that he may receive it on payment of the price.

(i) *Rugg v. Minett*, 11 East, 210.

(l) *Austen v. Craven*, 4 Taunt. 648. *White v.*

(k) *Scott v. England*, 14 Law J. Rep. n. s. Q. B. 43. *Jenkyns v. Usborne*, 13 ib. 196. (C.P.)

Wilks, 5 Taunt. 176.

On a sale of muslins, where the note or memorandum of the contract of sale was to this effect, "Bought by Anne Knight of Frances Hopper, 100 pieces of muslins at 40s. a piece, to be fetched away by ten pieces at a time, and paid for as taken away," what was relied upon by Holt, J., as altering the property immediately, was, that the particular pieces to be delivered had been *marked and sealed* by the buyer. (m)

Ascertainment of the price.—So long also as anything remains to be done, as between the purchaser and the vendor for the purpose of ascertaining the *price* of the article, the right of property and the risk of loss are not altered.

A contract of sale was entered into in the following terms: "I have this day sold the bark stacked at Redbrook, at 9*l.* 5*s.* per ton of 21 cwt., to Hezekiah Swift, which he agrees to take and pay for it on the 30th of November." This contract was signed by the vendor and purchaser, and two persons were appointed by them to see the bark weighed. Eight tons 14 cwt. of the bark were weighed and delivered in the presence of the appointed parties, within a few days after the signing of the contract, but before the residue was weighed, a high flood arose and injured it, whereupon the purchaser tendered payment of the eight tons 14 cwt. which had been weighed, and refused to take and pay for the remainder; and it was held that the right of property in the unweighed residue had not been altered, neither, consequently, had the risk of loss, and that no action for the price could be sustained against the purchaser. "Inasmuch," observes Bayley, J., "as the bark is to be paid for at 9*l.* 5*s.* per ton, and as the price could not be ascertained until the act of weighing took place, which was an essential thing to be done by the seller, the property in the bark did not, in my opinion, vest in the purchaser until that act was done. It is clear that the seller had a right to insist upon the actual possession of the bark remaining with himself, or under his control, until the act of weighing was completed. If the vendor had intended to get rid of his own liability to any risk to which the bark might be exposed, he might have given notice to the purchaser that he would at a given period cause the bark to be weighed and the price ascertained, and thus have cast upon the purchaser all liability for risk. That was a matter of option with himself, but until he had performed the act of weighing, either at his own instance or at the desire of the defendant, I think that all the consequences arising from the bark being allowed to remain in the possession of the seller, must be at his risk, and not at that of the buyer." (n) So where the contract of

(m) *Knight v. Hopper*, Skin. 647.

(n) *Simmons v. Swift*, 8 D. & R. 703, 4, 5; 5 B. & C. 862, 3, s. c.

sale was in the following form, "Bought of Mr. S. Zagury, 289 bales of skins, from Mogadore, per Commerce, Captain J. Horswell, containing five dozen in each bale, at the rate of 57s. 6d. per dozen, to be taken as they now lay with all faults, paid for by good bills at five months," and it appeared that by the usage of trade it was the duty of the seller of goat skins by bales in this manner to count them over, that it might be seen whether each bale contained the number specified in the contract, and that before any enumeration of the skins in question, the whole were destroyed by fire at the wharf where they lay at the time of the sale, it was holden that an action could not be maintained against the purchaser for the value of the skins, as the enumeration which was necessary to ascertain the price preceded the vesting of the right of property in the purchaser. (o)

Every thing that is to be done on the part of the vendor to complete the sale, and place the article or thing sold at the disposal of the purchaser, so far at least as to enable the latter to obtain possession of it and deal with it as he may think fit, on payment or tender of the price, must be performed before the right of property and the risk of loss are altered. (p) The article, also, when put into a deliverable state, must, where the purchaser has had no previous opportunity of inspection, fairly correspond in quantity and quality with the thing bargained for, as no man can be compelled to take and pay for a commodity different from that which he agreed to buy. (q) But when every thing that the seller is to do to complete the sale has been faithfully performed, the property and the attendant risk pass to the purchaser, although the latter may not have got the right of *possession* of the subject matter of the sale, or perfect control over it, by reason of the non-performance of some act to be done exclusively by him, such as procuring wines and spirits to be gauged by a custom-house officer, in order to ascertain their strength preparatory to the calculation of the duty, payment of the duty when calculated and ascertained, or the non-performance of any other act which it is incumbent on the *buyer* alone to perform. (r)

Contracts for the making or manufacture of goods and chattels.—

Where any specific chattel is ordered to be made or manufactured, the right of property is not vested in the party who gives the order, nor the right to the price in the vendor, until the thing ordered is completed and made ready for delivery, and has been *approved* by the purchaser, or some

(o) *Zagury v. Furnell*, 2 Campb. 239.

(p) *Smith v. Chance*, 2 B. & Ald. 758.

(q) *Kent v. Huskisson*, 3 B. & P. 238; Post, ch. 7, implied warranties on sales.

(r) *Rugg v. Minett*, 11 East, 209, 217. *Studdy v. Saunders*, 8 D. & R. 403. *Hinde v. Whitehouse*, 7 East, 558.

person appointed on his behalf to inspect the materials and the workmanship. The builder or maker is not bound to deliver to the purchaser the identical chattel which is in progress, although the purchase-money may have been paid in advance, but may, if he pleases, dispose of it to some other person, and deliver to the purchaser another chattel, provided it answers to the specification or description contained in the contract. (s) But where the contract provides that the article shall be manufactured under the superintendence of a person appointed by the purchaser, and also fixes the payment by instalments, regulated by particular stages in the progress of the work, the general property in the materials used vests in the purchaser at the time when they are put together, under the approval of the superintendent, or, at all events, when the first instalment is paid, subject to the right of the builder to retain the fabric, in order to complete it and earn the rest of the price; and the rights of the parties are then in the same state as if so much of the article as is then constructed had originally belonged to the purchaser, and had been delivered by him to the builder to be added to and finished. (t) And when the article is completed and made ready for delivery, and has been approved by the purchaser, the general property therein is transferred to the latter, although the chattel may remain in the hands of the builder for the purpose of receiving some subsequent additions and improvements. (u)

The vendor's right of action for the price and for non-acceptance of the thing sold.—If the purchaser refuses to accept the goods when tendered, or to take and pay for them within a reasonable period, after request, the vendor may bring an action against him for a breach of contract in not accepting them, (x) and may recover the amount of the value of the goods; he may also resell the goods, and recover from the purchaser the losses and expenses of the resale. (y)

If a time for the delivery is appointed by agreement of the parties, and the purchaser before the time arrives gives notice to the vendor that he will not accept the goods if delivered, such notice is not an immediate breach of contract, and does not enable the vendor immediately to bring an action to recover damages. The vendor is "bound to wait until the time for delivery arrives, to see whether the purchaser will *then* receive

(s) *Atkinson v. Bell*, 8 B. & C. 282; 2 M. & R. 801, a.c. *Mucklow v. Mangles*, 1 Taunt. 318. *Clarke v. Spence*, 4 Ad. & E. 466. *Laidler v. Burlinson*, 2 M. & W. 615. *Elliott v. Pybus*, 4 M. & Sc. 389; 10 Bing. 512, a.c.

(t) *Clarke v. Spence*, 4 Ad. & E. 470, 1. *Woods v. Russell*, 5 B. & Ald. 942.

(u) *Carruthers v. Payne*, 2 M. & P. 441.

(x) See post. ch. 7, section 2, on implied promises between vendors and purchasers. *Atkinson v. Bell*, 8 B. & C. 283; 2 M. & R. 299, a.c. *Chapman v. Morton*, 11 M. & W. 540.

(y) *Maclean v. Dunn*, 1 M. & P. 780, 781. *Stewart v. Cauty*, 8 M. & W. 160. *Langfort v. Tyler*, Balk. 112.

the goods and pay for them. . . . The notice is a mere nullity, and it is perfectly in his power to accept them nevertheless." (z)

The purchaser's right of action for the detention or non-delivery of the subject matter of the sale.—If the price and the subject matter of the sale have not been ascertained and identified, the purchaser cannot maintain an action for the detention of the thing agreed to be sold. Thus, it has been said, "If I sell you all my corn for 12*d.* a bushel, you may not take it before it is measured, whereby the number of the bushels may be known, and also the certainty of the sum which is to be paid for it, so that before the certainty is known it cannot be adjudged any good contract or agreement;" (a) but the purchaser, "a convenient time" after request and tender of the price, may maintain an action against the vendor for a breach of contract in neglecting to deliver an article fairly corresponding with the description given and agreed upon, and also for the non-performance of all such acts as are necessary to be done on the part of the vendor to put the thing sold into a deliverable state, and ascertain the price and carry the sale into effect. (b)

Of the time within which the contract of sale must be fulfilled.

If the subject matter of the sale has been selected and identified, and the price paid, or if a future day is appointed for payment, the goods being sold upon credit, the right of possession, as well as the right of property in, the thing sold, at once passes to the purchaser, and the latter may forthwith take the article, or sue the vendor for its detention or non-delivery. (c)

If no time has been appointed for the performance of the acts of delivery and payment, the vendor is bound to deliver the goods within a reasonable period after request and tender of the price; and the purchaser must in like manner accept the goods, and pay for them on delivery, or offer of delivery being made by the vendor; and if the contract is not carried into effect within a reasonable period, either on the part of the vendor or the purchaser, it is deemed to be dissolved and abandoned by mutual consent. (d) When the acts of payment and delivery are concurrent, "if one party was ready and willing, and offered to perform his part of the contract, and the other neglected or refused to perform his, he who was ready

(z) Parke, B., *Phillips v. Evans*, 5 M. & W. 477.

(a) Bradshaw arg. *Sharlington v. Strotton*, Flwd. 298.

(b) Post. ch. 7, Implied Promises.

(c) *Bloxam v. Saunders*, 7 D. & B. 405; 4 B. & C. 941, s. c.; Anon. Dy. 30 a. *Startup v.*

Cortassi. 2 C. M. & R. 169; *Noy's Maxims*, ch. 42, 1; *Shap. Touch.* 225.

(d) Holt, C. J., *Langford v. Tiler*, 1 Salk. 113; 1 Raym.; Domat. on the Contract of Sale, L. 1, tit. sect. 2. *Lanyon v. Toogood*, 13 M. & W. 27.

and offered has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act." (e)

If the right of property has passed by the bargain, and the purchaser fails in the performance of the concurrent act of payment, such right of property is reinvested in the vendor, together with the right of possession, and the latter is discharged from all further obligation to complete the contract. But if credit has been given, or the acts of delivery and payment are *not concurrent*, and do not constitute *mutual conditions*, the right of property is not reinvested in the vendor, on the failure of the vendee to pay the price at the time appointed. — The defendants sold to the plaintiffs a parcel of wheat under the following contract: — Sold the 25th of October, 1836, to Messrs. Wilmshurst and Son, about three hundred quarters of wheat, as per sample, at 51s. per quarter on board. Payment by banker's draft on London, at two months' date, to be remitted on receipt of invoice and bill of lading." The wheat was shipped under a bill of lading, making it deliverable to "order or assigns," and the defendants sent the plaintiffs the bill of lading, indorsed generally, and an invoice, stating the wheat to be shipped by order and for the account and risk of the plaintiffs. On the receipt of the invoice and bill of lading, the plaintiffs, instead of a banker's draft on London, transmitted to the defendants their own acceptance for the invoice price, which the defendants immediately returned, stating that it was "contrary to agreement;" and they then went on board the vessel, intercepted the delivery of the wheat, and afterwards sold it to other parties; but it was held that they had no right so to do; that the delivery of the bill of lading, and the remitting of the banker's draft, could not be considered simultaneous and concurrent acts, and that they had therefore no right to rescind the contract, and could not reinvest the right of property in themselves. (f) The remittance of the draft might indeed have been a condition precedent to the plaintiff's right of possession, but its non-remittance could not authorize the defendants to dissolve the contract and resell the subject matter thereof.

Six stacks of oats were sold upon the following terms:—"April 23rd, 1838.—Sold to Mr. J. Martindale, (the plaintiff,) six stacks of oats, for 35*l*."—John Smith (the defendant) gives John Martindale liberty to let

(e) *Jones v. Barkley*, Doug. 684; *Kingston v. 7 M. & Gr. 882, s.c.*; 3 Sc. N. R. 291; 5 Bing. Preston, cited ib. 691. N. S. 541; 7 Sc. 561.

(f) *Bowker v. Wilmshurst*, 8 Sc. N. R. 571;

the stacks stand, if he thinks fit, until the middle of August next; and John Martindale to pay John Smith for the stacks in twelve weeks from the date hereof." At the end of the twelve weeks the defendant called on the plaintiff to pay the purchase-money, when the latter requested a short extension of the credit, which the defendant refused, saying that he should consider the contract at an end, and that the plaintiff, as he had failed in payment at the time appointed, should not have the stacks. Two or three days after, the plaintiff tendered the money, but the defendant refused to accept it, and afterwards sold the stacks, and it was held that he was not justified in so doing, and that the right of property in the stacks was not divested out of the plaintiff. (g)

So where the defendant sold to the plaintiff a quantity of apples, under a written agreement, which fixed the day of payment, and was silent as to the time of delivery, and the plaintiff neglected to pay the money at the time appointed, and also to remove the apples when requested so to do, it was held that the defendant had no right to rescind the contract, and resell the apples, on the plaintiff's making default in payment of the price at the time specified. (h)

When a particular day is appointed for the delivery of the goods, or the payment of the price, "the party has the whole of the day, and if one of several days, the whole of those days, for the performance of the tender on his part of the contract, but he must do all he can to make the payment or perform the act at a convenient hour before midnight. Therefore, if he is to pay a sum of money, he must tender it a sufficient time before midnight for the party to receive it. If he is to deliver goods, he must deliver them in sufficient time for examination and receipt. If the payment or delivery is to be performed at a certain place on a specific day, there the tender must be to the other party at that place; and as the attendance of the other is necessary at that place to complete the act, there the law, though it requires the other to be present, does not require him to be present through the whole day; and therefore it fixes a particular part of the day; and it is enough if he is at the place a convenient time before sunset, so that the act may be completed; and if the party tenders to the party present, or if absent, if the performance of it is before sunset, that is sufficient." (i)

The transfer of the right of property and possession defeated by the fraud or deceit of the purchaser.—If goods have been obtained by false

(g) *Martindale v. Smith*, 1 Ad. & E. n. s., 395.

(h) *Milgate v. Kebble*, 3 Sc. N. R. 358.

(i) Parke, B., *Startup v. Macdonald*, 7 Sc. n. s. 285, 297; 12 Law J. Rep. n. s. (Exchr. Ch.) 483.

pretences, or by fraudulent concealment, or through the medium of a colourable purchase made with the preconceived design of obtaining possession of the goods, and evading payment of the price, the vendor may treat the contract as a nullity, and recover or retain possession of the things sold; (*k*) and payment by a check or note, known by the purchaser to be forged, or to be of no value, or the pawning of the goods, or the selling them at reduced prices, or preparations for flight or concealment, are circumstances from which the preconceived fraudulent determination may reasonably be inferred. (*l*)

The purchaser's right of possession divested by his bankruptcy or insolvency.—If goods have been sold upon credit, or a bill of exchange, or a promissory note has been given for the price, and the right of possession, as well as the right of property, has consequently become vested in the purchaser, this *right* of possession is liable to be defeated, if he becomes insolvent before he obtains “actual possession.” (*m*) It becomes important, therefore, to determine what does, and what does not, constitute a complete delivery and acceptance of the goods by the purchaser, so as to give him the *actual* possession, and make him complete owner in point of law.

It has been holden, that a delivery order made on a wharfinger or warehousekeeper, or other agent of the vendor having the custody of the goods, directing him to deliver them to such a purchaser, given by the vendor to the purchaser in execution and fulfilment of a contract of sale, and presented by the latter to such wharfinger, warehousekeeper, or other bailee of the goods, and accepted by him, does not transfer the “*actual* possession,” and constitute the purchaser complete owner, so long as anything remains to be done to ascertain the quantity or quality of the article, or to fix the price, and put the subject matter of the sale in a deliverable state, and place it at the disposal of the purchaser.

Thus where the vendor having eighteen tons of Riga flax in mats lying at a wharf, sold ten tons thereof to a purchaser, at 118*l.* per ton, to be paid for by the purchaser's acceptance at three months, and gave the latter a delivery order on the wharfingers for the ten tons, which order was accepted by them, and entered in their books, it was holden that the right of property in the flax did not pass to the purchaser until it had been weighed, and the precise quantity to be delivered had been separated from

(*k*) *Noble v. Adams*, 7 Taunt. 59. *Read v. Hutchinson*, 3 Camp. 352. *Earl of Bristol v. Wilmore*, 2 D. & B. 755; 1 B. & C. 514, s. c.
(*l*) *Ferguson v. Carrington*, 9 B. & C. 59.

Irving v. Molley, 5 M. & P. 380; 7 Bing. 543, s. c. *Hawse v. Crowe*, R. & M. 414.

(*m*) *Feise v. Wray*, 3 East, 93. *Jenkyns v. Osborne*, 13 Law J. Rep. n. s. 201. (C. P.)

the mass of the commodity, and put into a deliverable state, and set apart for the purchaser. The order to deliver given to the wharfingers, and entered in their books, would not of itself be sufficient, observes Lord Ellenborough, to transfer the property, unless the flax were in a deliverable state.—“ Here further acts were necessary to be done by the seller to make it so ; for the flax was to be weighed, and the portion of the entire bulk to be delivered was to be ascertained ; and if the weight of any number of unbroken mats was insufficient to satisfy the quantity agreed upon, it would have been necessary to break open some mats in order to make up that quantity. Therefore it was impossible for the purchaser to say that any precise number of mats exclusively belonged to him. It was uncertain how many gross mats there would be, or what fraction of a broken mat. This uncertainty at the time of the contract was to be reduced to certainty by something to be done afterwards, that is by weighing, in order to ascertain the entire quantity. If then some further acts were to be done to regulate the identity, and (if I may use such a phrase) the individuality of the thing to be delivered, I cannot say that it was in a state fit for immediate delivery, and that the order to deliver entered in the wharfinger's books operated as a complete delivery.” (n)

So where the vendor being possessed of thirty tons of hemp, lying at his wharfinger's, booked in his name, sold ten tons thereof, at 118*l.* per ton, payable by the purchaser's acceptance at three months, and gave the wharfingers an order to “ weigh and deliver ten tons of hemp ” to the purchaser, which order was presented to the wharfinger, and accepted by him, and entered in his books, and ten tons, part of the above-mentioned thirty tons, were transferred into the name of the purchaser ; but before the quantity was weighed off and actually separated from the rest of the thirty tons, and the bill accepted, the purchaser stopped payment, it was held that, as the weighing and separation of the quantity sold from the mass of the commodity necessarily preceded the delivery, the delivery was not complete until that had been done, and that the vendor consequently was at liberty to countermand the delivery order. “ The vendor's right to rescind the contract,” observes Gibbs, C. J., “ depends upon the question whether the delivery under this order was complete ; for if the delivery was complete, the contract was executed, and could not be rescinded. If anything remained to be done as between the vendor and the vendee, the delivery could not be complete, and the vendor, upon the insolvency of the vendee, might rescind the contract. There is no authority to the wharfinger

(n) *Busk v. Davis*, 2 M. & S. 402. See post, pp. 63, 64, as to when the acceptance of a de-

livery-order operates as a constructive delivery of the goods themselves.

to deliver but what this order gives. The question is, whether the delivery had taken place under it. See what the order was, and how much of it was executed! The order is to *weigh* and deliver; it gives no authority to deliver the hemp until the wharfinger had weighed it off. It was not weighed off before the insolvency and countermand of the order, and consequently no delivery could have taken place within the meaning of the order, and the vendor might still rescind the contract." (o)

So where fifty tons of oil were sold at a fixed price, and an order for the delivery thereof was given to the purchaser, and forwarded to the wharfinger who had the custody of the oil, but it was the custom of the trade for the casks to be searched by the cooper of the vendor, and for the broker of both parties to examine them to ascertain the foot dirt and water in each, with a view to certain allowances in respect thereof, and then the casks were to be filled up by the cooper at the expense of the vendor, it was held that the sale was not complete to transfer the property so long as these preliminary acts remained unperformed. (p)

A purchaser agreed to purchase the "small parcel of starch" belonging to the vendor, which he had seen lying at the warehouse of a third party, at 6*l.* per cwt., to be paid for by bill at two months, 14 days to be allowed for delivery, and the vendor gave a note to the purchaser addressed to the warehousekeeper, directing him to "weigh and deliver" to the purchaser "all his starch," which order was forthwith lodged at the warehouse, and a large portion of the starch, on that and two subsequent days, weighed and delivered to the purchaser, and removed pursuant to the order, but the residue remained unweighed in the warehouse in the name and at the expense of the vendor, it was held that the purchaser had no right to the possession of such residue until the weighing had been completed and the price ascertained, and that the vendor might, notwithstanding the part delivery of the starch, upon the bankruptcy of the purchaser, retain possession of the unweighed residue continuing in the warehouse. "The price," observes Lord Ellenborough, "is made to depend on the weight. The weight therefore must be ascertained in order that the price may be known and paid. In this case a partial weighing and delivery of several quantities of the starch contracted for had taken place; the remainder of it was unweighed and undelivered; and of course no such bill of two months for the price so depending on the weight could yet be given. On the part of the purchaser, it is contended that the delivery of part of an entire quantity of goods contracted for, is a virtual delivery of the whole,

(o) *Shepley v. Davis*, 5 Taunt. 617.

(p) *Wallace v. Breeds*, 13 East, 522.

so as to vest in the purchaser the entire property in the whole, though the price should not have been paid. But in this case the weighing necessarily preceded both the payment of the price and the delivery of the goods bargained for. Until the starch was weighed, the warehousekeeper was not authorised to deliver it, still less was the purchaser authorised to take it by his own act from the warehouse; and if he could not so take it, neither can he maintain this action, founded on such a supposed right to take. (*q*)

The question of actual delivery is in all cases to be determined by the conduct and acts of the parties, and the surrounding circumstances of the transaction. (*r*) The taking of samples, cooping casks, and the general exercise of acts of ownership by the purchaser over the subject matter of the sale in those cases where nothing but delivery remains to be performed to execute the contract, are circumstances from which an actual transfer of the possession and receipt of the article by the purchaser may be fairly presumed; but they are equivocal acts, open to explanation, and afford no sufficient or satisfactory proof of delivery on the one hand, and receipt on the other, if they have been done without the knowledge or sanction of the vendor.

Thus, where forty-six puncheons of rum, lying in a warehouse at Liverpool, were sold and paid for by the purchaser's acceptance of bills at three months, and whilst the bills were running, the purchaser, who was the clerk of the warehousekeeper, and had consequently free access to the rum, had, without the knowledge of the vendor, marked, coopered, and gauged the casks, and resold part of the rum to other parties, but no delivery-order had been given by the original vendor except for two puncheons of the rum, and the invariable mode of delivering goods lying in warehouses in Liverpool, is by the vendor's giving a delivery-order to the purchaser, it was held that the first purchaser had never acquired the actual possession of the rum, and on his dishonouring his acceptances, that the original vendor had a lien on it for the price, also that the second purchaser was in no better situation than the first, and had no right to demand the goods, although he had paid the price to his immediate vendor, the first purchaser. (*s*)

If the warehouseman be himself the vendor, or the vendor is his own warehouseman, and gives to the purchaser a delivery-order, or an acknowledgment that he holds the goods on account of, or to the order of, the latter, he has a right to revoke that order, and retain possession of the

(*q*) *Hanson v. Meyer*, 6 East, 625.
 (*r*) *Blenkinsop v. Clayton*, 1 Moore, 331.
Jones v. Jones, 8 M. & W. 442. Parke, B., *White-*

head v. Anderson, 9 M. & W. 529, 535.
 (*s*) *Dixon v. Yates*, 5 B. & Ad. 313; 2 N. & M. 177, s. c. *Craven v. Ryder*, 6 Taunt. 433.

goods, in case of the insolvency of the purchaser before actual payment, so long as such delivery-order remains in the hands of the latter, and the goods have not been resold. (t) The marking of goods, and packing them up in boxes or cloths belonging to the purchaser, do not constitute a delivery so long as the goods remain in the custody of the vendor, inasmuch as the latter has not, until he has actually parted with the possession of them, lost his lien for the price; (u) and the delivery of part of the goods does not, as before mentioned, operate as a constructive delivery of the whole, so as to deprive the vendor of his right to the possession of the residue until payment of the price. (x) And this right to rescind the contract and retain possession of the goods, is not taken away or destroyed by a part payment of the purchase-money, or by the purchaser's acceptance, as previously mentioned, of a bill of exchange or promissory note for the price. (y)

Stoppage in transitu.—And although the vendor has dispatched the goods to the buyer, and parted with the actual possession of them, yet so long as they are *in transitu*, and have not reached their final destination, and come into the manual possession of the purchaser, or that of any other party whom he may have appointed his agent, finally to take possession of and keep the goods for him, the vendor is entitled, if unpaid, to retake the goods and put himself into the same situation as if he had never parted with the actual possession of them: (z) and the goods are held to be *in transitu*, although they may have been consigned to a carrier specially appointed by the purchaser to receive them, or may be under the charge of a general *forwarding* agent of the purchaser, or in the hands of a packer or wharfinger, or innkeeper, or any other middleman, forming a mere link in the chain of communication and transmission from the buyer to the seller: and the *transitus* continues, into whatever hands they may happen to fall, until they have reached their destination, or have been actually delivered to the consignee. (a) Thus, where the vendor had received an

(t) *Townley v. Crump*, 4 Ad. & E. 58; 5 N. & M. 606, s. c.

(u) *Boulton v. Arnott*, 1 C. & M. 333. *Holder-ness v. Shacksels*, 8 B. & C. 619; 3 M. & R. 33, s. c. *Goodall v. Skelton*, 2 H. Bl. 316.

(x) *Bunney v. Poyntz*, 4 B. & Ad. 568. *Dixon v. Yates*, 5 B. & Ad. 339.

(y) *Hodgson v. Loy*, 7 T. R. 440. *Feiss v. Wray*, 3 East, 98. *New v. Swain*, 1 Dans. & Ll. Merc. c. 193. *Miles v. Gorton*, 2 Cr. & M. 512. *Edwards v. Brewer*, 2 M. & W. 375. In *Bunney v. Poyntz*, 4 B. & Ad. 573, the vendor's agent had received a promissory note for the price, and indorsed it and got it discounted at his banker's, and made away with the money;

there had been therefore an actual payment to the vendor, and the latter, consequently, had lost his lien for the price.

(z) *Snee v. Prescott*, 1 Atk. 248. *Dixon v. Baldwin*, 5 East, 184. *Tucker v. Humphery*, 1 M. & P. 392, 393. *Clay v. Harrison*, 10 B. & C. 99; 5 M. & R. 17, s. c. *Gibson v. Carruthers*, 8 M. & W. 336, 348.

(a) *Slater v. Le Feuvre*, 2 Sc. 146; 2 Bing. n. s. 81. *Crawshaw v. Eades*, 2 D. & R. 288; 1 B. & C. 181, s. c. *Bartram v. Farebrother*, 1 M. & P. 515; 4 Bing. 579, s. c. *Edwards v. Brewer*, 2 M. & W. 375. *Smith v. Goss*, 1 Camp. 282.

order for merchandise, to be sent to Lisbon, and had delivered the goods to the general forwarding agents of the purchaser at their warehouse in Manchester, and before they were sent out the principal became insolvent, it was held that the unpaid vendor was entitled to stop the goods in the warehouse of the Manchester agent, (b) and this right is not destroyed, although the goods may have been shipped, and the prior carriage and wharfage dues paid by the general shipping agent of the purchaser, but continues until the goods reach their place of destination beyond sea, and get into the actual *possession* of the purchaser; (c) and where goods shipped on board a vessel were to be delivered to the purchaser "in the port of London," and the vessel arrived at her moorings in the river Thames, and the goods were put into the lighters of a wharfinger employed and paid by the defendant, to be conveyed to the defendant's wharf, it was held that the *transitus* was not determined. (d) Neither is the *transitus* determined by the actual arrival of the goods in boats or lighters alongside the purchaser's wharf, if the boats and lighters are used merely as the vehicle of conveyance, and not as places of deposit and ultimate reception. (e)

So long as the goods have not come unto the actual or constructive possession of the purchaser the right of stoppage is not taken away.

"If the vendee takes the goods out of the possession of the carrier into his own, before their arrival at their destination, with or without the consent of the carrier, there seems to be no doubt that the transit would be at an end; though, in the case of the absence of the carrier's consent, it may be a wrong to him for which he would have a right of action. This is a case of *actual* possession. A case of constructive possession is where the carrier enters expressly or by implication into a new agreement distinct from the original contract for carriage, to hold the goods for the consignor as his agent, not for the purpose of expediting them to the place of original destination, pursuant to the contract, but in a new character for the purpose of custody on his account, and subject to some new or further order to be given by him. It appears to be very doubtful whether an act of marking or taking samples, or the like, *without any removal of the goods from the possession of the carrier*, though done with the intention to take possession, would amount to a constructive possession, unless accompanied with such circumstances as to denote that

(b) *Coates v. Railton*, 9 D. & R. 593; 6 B. & C. 422, s. c.

(c) *Slater v. Le Feuvre*, 2 Sc. 146; 2 Bing. n. s. 81, s. c.; 1 Hodg. 255; 7 C. & P. 91, s. c. *White-*

head v. Anderson, 9 M. & W. 518.

(d) *Jackson v. Nichol*, 7 Sc. 577; 5 Bing. n. s.

(e) *Crawshaw v. Eades*, 2 D. & R. 288. *Tucker v. Humphrey*, 1 M. & P. 378; 4 Bing. 516, s. c.

the carrier was intended to keep, and assented to keep the goods in the nature of an agent for custody on account of the consignee." (f)

A cargo of timber was ordered of a merchant at Quebec to be delivered at the port of Fleetwood. The vessel arrived in port on the 8th of August, and on the evening of that day, the purchaser's agent went on board, and told the captain that he had come to take possession of the cargo, and the captain said he would deliver it to him when he was satisfied about the freight. Subsequently the captain and the agent went ashore, and the agent advanced him a sum of money on account of the freight, and immediately afterwards the captain received notice from the vendor not to deliver the goods, and it was held that no possession had been taken of the cargo, either *actual* or *constructive*, so as to deprive the unpaid vendor of his right of stoppage *in transitu*. (g)

And, although the goods may have been landed and warehoused at a place commonly used by the purchaser as a place of deposit, yet, if the latter, finding himself to be in failing circumstances, has previously declared it to be his intention not to accept them, and not to take possession of them as *owner*, the contract of sale has not been consummated by delivery, and the unpaid vendor's right of recovering possession has not been destroyed. (h)

The vendor's right to stop *in transitu*, cannot, of course, be defeated by any claim of lien on the part of a carrier by land or water, wharfinger, or any other middleman, for a general balance claimed to be due to him from the intended purchaser, nor by a foreign attachment laid upon the goods by a creditor. (i)

Effect of part delivery of a quantity of goods sold under an ENTIRE CONTRACT.—Several parcels of goods were purchased under one entire contract from Hill and Co., at Hull, by the consignee living at Mickley, about thirty miles from Leeds. A part—two packages—were forwarded by railroad to Leeds, and arrived on the 20th of August. One of these packages was taken to Mickley Mills by the consignee on the 23rd of August, and the other remained in a warehouse used by the consignee as a customary place of deposit. In the mean time, some remaining parcels comprised in the *same contract of sale*, were forwarded by water carriage to Boroughbridge, and were there stopped *in transitu* on the 8th of September; and it was contended, that as all the pack-

(f) Parke, B., *Whitehead v. Anderson*, 9 M. & W. 534, 535.

(g) *Ib.* 518.

(h) *James v. Griffin*, 2 M. & W. 623.

(i) *Patten v. Thompson*, 5 M. & S. 350. *Crawshaw v. Eades*, 2 D. & R. 288. *Oppenheim v. Russell*, 3 B. & P. 42; *ib.* 119. *Tindal, C. J., Jackson v. Nichol*, 7 Sc. 591; 5 Bing. N. S. 518, s. c.

ages formed part of one entire contract of sale, the stoppage of the parcels that had been sent by water, had the effect of revesting in the consignee, at that time, all the parcels of goods contained in that contract, and, amongst others, the parcel which had been actually delivered to the defendant, and the one which remained in his constructive possession in the warehouse, but the court were of a contrary opinion. "What the effect of stoppage *in transitu* is," it was observed, "whether entirely to rescind the contract, or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down, is a point not yet finally decided, and there are difficulties attending each construction. If the latter supposition be adopted, (as most of us are strongly inclined to think it ought to be on the weight of authority,) the vendor is entitled to retain the part actually stopped *in transitu*, till he is paid the price of the whole, but has no right to retake that which has arrived at its journey's end. His right of lien on the part stopped is revested, but no more. My Lord Chief Baron," observed Parke, B., "has expressed an opinion to which he still adheres, that the contract is rescinded by a stoppage *in transitu*, but he does not think that this affects the right of the vendee to retain that portion of the goods which have been actually delivered to him, or, in other words, which have reached the place of their destination, more especially when the goods and the price may be apportioned, as in the present case, and a new contract implied, (*k*) from the actual delivery and retention of a part." (*l*)

If the contract is not rescinded by the bankruptcy, the vendor would have a right to call upon the assignees for payment of the price, and in case of their refusal or neglect, within a reasonable period after request, the contract would be deemed to be abandoned by mutual consent.

"There is no distinction with reference to the right of stoppage *in transitu* between the seller of goods, of which the property is in the vendor, and the seller of the interest which he has in the contract for the delivery of the goods to him. If he may rescind the contract in the one case from the insolvency of the purchaser, he must, by parity of reasoning, have a right to rescind it also in the other." (*m*)

As to what is a sufficient notice of stoppage in transitu.—The ancient rule of law used to be, that a stoppage *in transitu*, could be effected only

(*k*) See post, ch. vii. sect. 2, as to promises implied by law in respect of goods received under a contract of sale which has been rescinded.

(*l*) *Wentworth v. Outwaite*, 10 M. & W. 451,

452.

(*m*) *Tindal C. J., Jenkyns v. Usborne*, 13 Law J. Rep. N. S. 201, 202. (C. P.)

by the corporal touch of the goods, but that rule no longer prevails.⁽ⁿ⁾ "A notice to the carrier, on the part of the unpaid vendor, is generally a sufficient stoppage *in transitu* . . . but to make a notice effective, as a stoppage *in transitu*, it must be given to the person who has the immediate custody of the goods; or, if given to the principal, whose servant has the custody, it must be given at such a time and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent a delivery to the consignee. Notice to a principal at a distance is insufficient to revest the property in the unpaid vendor, and render the principal liable for a subsequent delivery by his servants to the vendee, when it was impossible, from the distance and want of means of communication, to prevent that delivery."^(o)

Benbow, a merchant in Liverpool, ordered a cargo of timber of Symes, a merchant at Quebec, which was despatched from thence on board a ship belonging to Birnie, of Montrose, chartered by Benbow. The timber was deliverable in the port of Fleetwood, in Lancashire. The price was not paid; and, before the arrival of the vessel in England, Benbow became bankrupt; thereupon, the defendants, who were the agents and correspondents of the vendor, and had a general authority to act for him, in case "any difficulty should arise," gave, on the 18th of July, to Birnie, the owner at Montrose, a notice of stoppage *in transitu* on behalf of the vendors; and Birnie, on the 20th of the same month, wrote to the captain, apprising him of the failure of Benbow, and appointing certain parties to take charge of the cargo, on behalf of the vendor, and sent the letter to await the arrival of the vessel at Fleetwood. On the 8th of August following, the captain arrived there with the vessel and cargo; but on that evening, and *before* the receipt of the letter by the captain from his employer, an agent of the assignees of Benbow went on board to take possession of the cargo, and it was held that the notice given by the defendants on the 18th of July to Birnie, the ship-owner residing at Montrose, was not effective as a stoppage *in transitu*, the cargo then being on the high seas, on its passage to Fleetwood, and not in his personal custody.^(p)

Consummation of the contract by actual delivery.—"The actual delivery to the vendee or his agent, which puts an end to the *transitus* or state of passage, may be at the vendee's own warehouse or at a place which he

⁽ⁿ⁾ *Mills v. Ball*, 2 B. & P. 457. *Litt v.* & W. 534.

Cowley, 7 Taunt, 169; 2 Marsh, 457, s. c.;
Holt, 338; 5 East, 184.

^(o) *Parke, B., Whitehead v. Anderson*, 9 M.

^(p) *Whitehead v. Anderson*, 9 M. & W. 518,
531.

uses as his own, though belonging to another, for the deposit of goods, or at a place where he means the goods to remain until a fresh destination is communicated to them by orders from himself, or, it may be, by the vendee's taking possession by himself or his agent, at some point short of the original intended place of destination." (q) If a man, for example, having no warehouse of his own, is in the habit of using the warehouse of his wharfinger, or carrier, or packer, as his own, and making it the repository of his goods until he has sold them or shipped them for exportation, the *transitus* is at an end, and the delivery is complete when the goods arrive at that warehouse and customary place of deposit; (r) although they may immediately afterwards have received a fresh destination by command of the purchaser. (s)

"If after the arrival of the goods at their place of destination, they be warehoused with the carrier, whose store the vendee uses as his own, or if they be warehoused with the vendor himself, and rent be paid to him for them, that puts an end to the right of stoppage." (t)

A trader in London was in the habit of purchasing goods and exporting them to the Continent, soon after their arrival in London. The goods so consigned to him remained in the waggon-office of the defendants, who were carriers, until they were removed by his agent for the purpose of being shipped. A consignment of goods for the trader was delivered to the defendants on the 9th and 12th of August. On the 14th and 17th, the goods arrived at the waggon-office of the defendants. On the 16th or 17th the trader became bankrupt, and on the 19th, the defendants received notice from the consignor, not to deliver the goods to the bankrupt, which order they obeyed, and afterwards delivered the goods to a third party, by the directions of the consignor, and it was held they were not justified in so doing, that the *transitus* ceased on the arrival of the goods at the waggon-office, that they had then come into the possession of the bankrupt, and that his assignees, consequently, were entitled to them. (u)

Twenty mats of flax were sold by a merchant of Hull to a Mr. Weatherall, of Mickley Mills, a place about thirty miles from Leeds; they were forwarded by railway to Leeds, and arrived at the warehouse of the defendants, who were carriers at that town. The warehouse was a large shed at the Railway terminus at Leeds, and it was the custom of the de-

(q) Parke, B., *James v. Griffin*, 2 M. & W. 633. *Jones v. Jones*, 8. ib. 442.

(r) *Richardson v. Goss*, 3 B. & P. 119. *Scott v. Pettit*, ib. 469. *Allan v. Grippen*, 2 Cr. & J. 218. *Foster v. Frampton*, 9 D. & R.

108; 6 B. & C. 107, s. c.

(s) 5 East, 184-5, *Noble v. Adams*, 7 Taunt. 59.

(t) 1 Smith's leading cases, 431, 435.

(u) *Rowe v. Pickford*, 8 Taunt. 83; 1 Moore 526, s. c.

defendants to give notice to Weatherall of the arrival of goods consigned to him, and for the latter to send waggons for them, and convey them to Mickley Mills to be manufactured. On the arrival of the flax, notice was given to Weatherall by letter, stating that unless the goods were sent for, they would remain at warehouse rent. Weatherall thereupon sent his cart, and took away ten of the mats, but before the others were removed he became bankrupt; and it was held that the goods had arrived at their place of destination, and had come into the constructive possession of the vendee, and that the *transitus* consequently was at an end when they had reached the carrier's warehouse, the customary place of deposit at Leeds. When notice had been sent to Weatherall of their arrival, and that he was to pay rent, the carriers held them, not as agents for forwarding them, but for their safe custody, and they were constructively in the purchaser's possession. "I think the goods," observes Parke, B., "had arrived at their place of destination, for that, as I understand, means the place to which they were to be conveyed by the carriers, and where they would remain unless fresh orders should be given for their subsequent disposition. In this respect the case falls within the principle of *Dixon v. Baldwin*, (x) in which Lord Ellenborough lays down the doctrine that the *transitus* is completely at an end when the goods arrive at an agent's who is to keep them until he receives the further orders of the vendee. After referring to the several cases upon the subject, he says, 'In those cases, the goods had so far gotten to the end of their journey, that they waited for new orders from the purchaser, to put them again in motion, to communicate to them another substantive destination, and without such orders they would continue stationary.' That appears to have been the case in the present instance. The parcels of flax were to remain stationary at the defendant's warehouse, till a further direction should be given by Weatherall, by an order to deliver to a purchaser, or to forward to himself by a new conveyance, and, if no further orders had been given, they would have continued there. I am of opinion, that on this ground the *transitus* was at an end, on the arrival of the goods at Leeds." (y)

So where goods are ordered by the principal to be sent to his general agent at a particular spot, and the latter receives them, not merely as a *forwarding* agent for the purpose of helping the goods on a stage further in a direct course of transmission to the principal, but as a *depository* invested with a general authority to receive goods and sell them for the principal, or to hold them generally on account of the latter, and at

(x) 5 East 175, 182.

(y) Parke B., *Wentworth v. Outwaite*, 10 M. & W. 450, 451.

his disposal, the delivery to such agent is a delivery to the principal, and the transitus consequently is determined as soon as the goods reach his hands. And if the transit be once at an end, it cannot commence *de novo*, merely because the goods are again sent upon their travels towards a new and ulterior destination. (z)

Le Grand and Co., of Paris, gave an order to a manufacturer at Manchester, to send goods to their agent in London, who was invested with a general authority to receive and hold goods on their account, and send them from time to time to such markets as they should direct or the agent himself should think advisable, and the goods were, by the agent's directions, sent to the house of his packer in London, and there unpacked, and part of the goods were sent away, and the remainder repacked, and left in the packer's house; it was held that the goods had got to their journey's end, and that the delivery to the agent was under the circumstances a delivery to the purchaser himself. (a)

Whenever, therefore, the goods get into the actual possession of the purchaser, or into the hands of a third party, who has received them by the direction and authority of the purchaser, and has agreed to hold them on account of the latter, and at his disposal, and is, therefore, answerable to him for their safe custody, the contract of sale is consummated, the *transitus* is at an end, and the vendor has lost all power of disposition and control over the goods. (b)

Transfer by bill of lading.—The contract of sale also may be consummated and the right of stoppage *in transitu* destroyed by the delivery of a bill of lading to the purchaser, and the indorsement and delivery thereof by such purchaser to a third party, who has again bought the goods *bona fide* for a valuable consideration, without notice of the non-payment of the price to the first vendor.

A bill of lading is an acknowledgment by the master or captain of a vessel of his having received the goods mentioned in such bill on board his ship, and an undertaking to deliver them to the order or assigns of the shipper or consignor. It is by the custom of merchants, recognised and sanctioned by the common law, a negotiable instrument, like a bill of exchange, and the indorsement and delivery of it to third parties, who have given credit to such bill of lading, and have bought the goods mentioned therein in ignorance of the state of accounts between the

(z) *Dixon v. Baldwin*, 5 East, 184. *Dodson v. Wentworth*, 5 Sc. N. R. 821.
(a) *Leeds v. Wright*, 3 B. & P. 320. Tindal, C. J., *Jackson v. Nichol*, 7 Sc. 590.

(b) *Ellis v. Hunt*, 3 T. R. 464. *Wright v. Lawes*, 4 Esp. 82. *Stoveld v. Hughes*, 14 East, 308. Parke, B., *James v. Griffin*, 2 M. & W. 623. *Foster v. Frampton*, 9 D. & B. 108.

shipper and his immediate purchaser, transfers the property to the indorsee as absolutely and effectually as if the goods themselves had been manually delivered.

As between the consignor or first vendor and his immediate vendee and the persons who have bought and sold to each other, the indorsement or delivery of the bill does not destroy the right of stoppage *in transitu*, and deprive the unpaid vendor of his right to recover and retain possession of the goods. Its existence does in no degree alter or vary the rights and respective situations of the immediate parties to the sale. As between the shipper and the captain, it fixes and determines the duty of the latter, as to the person to whom the goods are to be delivered, but it may be revoked and countermanded, in case of the insolvency of the consignee, at any time before it has been actually executed and obeyed by the delivery of the goods themselves, like any other order or direction to a common carrier. (c) But as between the consignor or first vendor and third parties, *bonâ fide* purchasers for a valuable consideration, the case is different. The first vendor, by indorsing and delivering the instrument to his immediate purchaser, accredits the title of the latter to the goods, and holds him out to the mercantile world as the owner of them, and the *bonâ fide* indorsement and delivery of such purchaser to a third party, consequently deprive the first vendor of all power and control over the goods, and destroy his right to stop *in transitu* as against such *bonâ fide* holder for value. (d) If the holder or assignee of the bill, however, has acted *malâ fide*, if he knew of the insolvency of the consignee at the time he took the bill, he will of course be in no better situation than the consignee his immediate vendor. (e)

A shipping note has not the effect and operation of a bill of lading, and does not transfer goods by indorsement; the goods, moreover, will not pass to third parties by the mere delivery of a bill of lading without indorsement, and the operation of the bill may be qualified and restricted by a conditional indorsement. (f)

Transfer by delivery orders.—If the subject matter of the sale be defined and identified, and the quantity and price ascertained and fixed, there may be a constructive delivery and consequent consummation of the contract of

(c) *Mitchell v. Ede*, 11 Ad. & E. 903. *Evans v. Nicholl*, 4 Sc. N. R. 53. *Wilmshurst v. Bowker*, 5 Bing. N. S. 551.

(d) *Lickbarrow v. Mason*, 6 East, 19, (a); 2 Smith's leading cases, 388, 435. *Cuming v. Brown*, 9 East, 505. *Caldwell v. Ball*, 1 T. R. 205. *Hibbert v. Carter*, ib. 745. *In re West-zinthus*, 5 B. & Ad. 817. *Jenkyns v. Osborne*,

13 Law J. Rep. N. S. 196. C. P. *Jones v. Jones*, 8 M. & W. 431.

(e) *Ellenborough, C. J.*, *Cuming v. Brown*, 9 East, 514. *Barrow v. Coles*, 3 Campb. 92.

(f) *Akerman v. Humphrey*, 1 C. & P. 57. *Jenkyns v. Osborne*, 13 Law J. Rep. N. S. 196. (C. P.) *Mitchell v. Ede*, 11 Ad. & E. 903.

sale, through the medium of a delivery order given by the vendor and accepted by a warehouse-keeper or wharfinger or other bailee of the goods, although the weighing and separation of the precise quantity to be delivered from a mass of the commodity in bulk, may be necessary to effect a *manual delivery* of the article or thing sold and place it in the *actual possession* of the purchaser.

Messrs. Dutton and Bancroft, oil merchants at Liverpool, having forty tons of oil lying in certain cisterns, of which they had the key, sold ten tons thereof to J. and L. Frost, who sold the same to one John Townsend, at a fixed price, and took his acceptance by way of payment, and gave him a delivery order on Dutton and Bancroft, to the following effect: "Messrs. Dutton and Bancroft,—Please to deliver the bearer, Mr. John Townsend, ten tons of Greenland whale oil, we purchased from you on the 8th of November last." This order was taken to Dutton and Bancroft, and they indorsed their acceptance on the back of it, and it was held, that as between the Frosts and Townsend the sale was complete, and that the Frosts consequently, on the bankruptcy of Townsend, the sub-vendee, before his acceptance became due, could not countermand the delivery order.

"After the acceptance of the order, Dutton and Bancroft held the oil for Townsend's use. But something, it is said, still remained to be done, namely, the measuring off the ten tons from the rest of the oil. . . . The objection only applies where something remains to be done, as between the buyer and *seller*, or for the purpose of ascertaining either the quantity, or the price; neither of which remained to be done in this case; for it was admitted by the persons who were to make the delivery to Townsend, that the quantity mentioned in the order was in the cistern in their custody; for they had before sold that quantity to the Frosts, of whom Townsend purchased it, and had received the price. Therefore, though something remained to be done, as between the vendee and the persons who retained the custody of the oil before the vendee could be put into separate possession of the part sold, yet as between him and his vendors, nothing remained to perfect the sale." (g)

A specified quantity of oats in a particular bin in a warehouse, was sold by Turner and Co., who gave to the purchaser the following delivery order, addressed to the warehouse-keeper: "Deliver Mr. J. Marsden, 1,028 $\frac{1}{4}$ bushels of oats, bin 40. O. W., and you will please *weigh them*

(g) *Le Blanc, J., Whitehouse v. Frost*, 12 Rep. N. S. 201. (C. P.)
East, 621. *Jenkyns v. Osborne*, 13 Law J.

over, and charge us the expense." The warehouse-keeper entered this order in his book, and two days afterwards, the oats being again sold, he received the following delivery order from Marsden: "Deliver Messrs. Swanwick and Hall, 1,028 $\frac{1}{2}$ bushels, in bin 40. O. Warehouse; and let them be *weighed over*, and send a note up: I will see it paid." This last order was likewise entered by the warehouse-keeper in his books, and the oats were transferred into the names of Swanwick and Hall, the last purchasers, but before they were manually delivered to them, and before any weighing had taken place, Marsden, their immediate vendor, became insolvent, and Turner and Co., the original vendors, gave the warehouse-keeper notice not to part with the oats, and subsequently induced him, on tender of an indemnity, to give them up to them. It appeared that the price had been ascertained and fixed at the period of each sale, that the last purchasers, Swanwick and Hall, had paid the price to Marsden, their vendor; that there were no other oats in bin 40, besides the oats in question, and that the weighing mentioned in the order was not usually performed before the time of manual delivery, when the grain was weighed to ascertain any loss of quantity for the *satisfaction of the purchaser*, and it was held that the delivery was complete by the transfer in the books of the warehouse-keeper, and that the latter was responsible to Swanwick and Hall, for having parted with the possession of the goods to Turner and Co., the original vendors. (h)

The weighing, it will be observed, was not necessary in this case, for the purpose of ascertaining either the price or the identity of the thing sold. The contract was for the sale of the contents of a particular bin at a fixed price, the vendor undertaking that such contents amounted to 1,028 $\frac{1}{2}$ bushels. The case, therefore, is distinguishable from the previous cases of *Busk v. Davis*, *Simmons v. Swift*, and *Hanson v. Meyer*, (i) where it was held, that the delivery was not complete, and that the contract was not executed until the weighing had been accomplished.

The acceptance of the delivery-order by the wharfinger or warehouse-keeper or other depository or bailee of the goods, and his assent to the delivery, under such circumstances, whether the order is or not entered in his books or filed in the warehouse, constitute him the agent or trustee of the purchaser, and bind him to hold the goods at the disposal of the latter, and there is therefore an executed delivery as much as if the goods had been delivered into the purchaser's own hands, or had been removed to his warehouse, and there put under lock and key. (k)

(h) *Swanwick v. Sothorn*, 9 Ad. & R. 895;
1 P. & D. 648, a. c.

(i) Ante, pp. 50, 51, 53.

(k) *Harman v. Anderson*, 2 Campb. 242.

A contract was entered into for the sale of twenty sacks of flour at a fixed price, and the vendor gave to the purchaser an order on the defendants his wharfingers to deliver to the purchaser "Twenty sacks of households." The order was presented to the defendants and filed by them in the usual course of their business, and it was held, that by their acceptance of the order, they had made themselves responsible to the purchaser for the delivery to him of the articles specified therein. "This was an order," observe Bayley and Vaughan, Bs., to deliver twenty sacks of flour, not out of a larger quantity, but twenty sacks specifically, and when the defendants accept that order without restriction, they admit that they have twenty sacks, which they will appropriate to that order, and they have no right afterwards to say that they have not twenty sacks unappropriated." . . . "The delivery order is taken to the wharfinger to see if the party giving the order has the articles mentioned in it in the wharfinger's possession. The defendants, in this instance, attorn, as it were, to the delivery order, and admit the purchaser's right to call upon them to deliver twenty sacks of flour. Having received that order, it is binding on them, (l) and they cannot afterwards deny the title of the purchaser.

A warehouseman had received an order from the vendor of a specific quantity of malt, to hold it on account of the purchaser, and the warehouseman assented to the order, and gave a written acknowledgment to the purchaser that he held it on his account, and afterwards refused to deliver it, on the ground, that by the usage of trade, the property in malt is not transferred to the purchaser until it is re-measured, and that before the malt was re-measured, the vendor became bankrupt; and it was held that this was no answer to the purchaser's claim against the warehouseman. "Whatever may be the rule," observes Lord Ellenborough, "between buyer and seller, it is clear that the defendant (the warehouseman) cannot say to the purchaser, the malt is not yours, after acknowledging that he held it on his account. By doing so, he attorned to the purchaser, and I should entirely upset the security of mercantile dealings, were I now to suffer him to contest his title." (m)

And, although the goods are not, at the time of the acceptance of the order, in the actual possession of the warehouseman, yet if they afterwards come to hand, he is bound to hold them at the disposal of the

Hurry v. Mangles, 1 Camp. 451. *Lucas v. Dorrien*, 1 Moore, 40, 41; 7 Taunt. 278, s. c. *Holl v. Griffin*, 3 M. & Sc. 732; 10 Bing. 246, s. c. *Kieran v. Sanders*, 6 Ad. & E. 515, 1 N. & P. 625, s. c.

(l) *Gillett v. Hill*, 2 C. & M. 536; 4 Tyr. 290, s. c. *Lackington v. Atherton*, 8 Sc. N. R. 42.

(m) *Stonard v. Dunkin*, 2 Campb. 344. *Craven v. Ryder*, 6 Taunt. 433; 2 Marsh. 366, s. c.

party to whom they are to be delivered. Thus, where a manufacturer deposited goods with a wharfinger at Stockton, to be shipped to the defendant's wharf in London, and took the wharfinger's receipt, describing the goods, and indorsed upon it an order upon the defendants to deliver the goods on their arrival to the plaintiffs, who had advanced money upon them, and the plaintiffs sent the receipt and the delivery order to the defendant, who accepted and retained possession thereof, stating that the goods had not arrived, but that when they did they should be forwarded to the plaintiffs; it was held, that the defendants, having thus assented to the order, and recognised the plaintiff's title to the goods, could not afterwards dispute it, and that when the goods came into their hands, they were bound to deliver them to the plaintiffs. (*n*)

And it has been held that there was an executed delivery, and consequent consummation of the contract of sale, in the following cases.

The defendants, who were auctioneers, sold by auction two ricks of hay, the produce of certain crops which had been distrained by a landlord for rent. By the conditions of sale the hay was to be removed by and at the expense of the purchaser, and the time specified for its removal being considered too short, the tenant, on the morning of the sale, gave a written permission for the hay to remain on the land for a longer period. The price of the hay was paid at the time of the sale, and a few days afterwards the purchaser received from the auctioneers a written order, addressed to the tenant, requiring him to permit the purchaser to remove the hay, but the tenant then refused, and would not suffer him to come upon the land to take it. The purchaser then brought an action against the defendants for the non-delivery, and the defendants pleaded that they did deliver possession to the plaintiff; and it was held, that this plea was supported by the facts, and constituted a defence to the action. The permission given by the tenant for the hay to remain on the land for the convenience of the purchaser, amounted, it was observed, to an attornment from the tenant to the purchaser, and was equivalent to an express undertaking on the part of the tenant to hold the hay for the purchaser's use and at his disposal, and that there had been an executed delivery, "just as if the auctioneer had, after the sale, in the tenant's presence, pointed out the rick to the purchaser, and the tenant had assented to the delivery. . . . The tenant's subsequent refusal to permit the purchaser to carry away the hay, cannot affect the vendor. The plaintiff might have maintained trover against the tenant for detaining the hay!" (*o*)

(*n*) *Holl v. Griffin*, 3 M. & Sc. 732; 10 Bing. 246, s. c.

(*o*) *Salter v. Woollams*, 3 Sc. N. R. 65, 67. See *Coe v. Clay*, 3 M. & P. 57; 5 Bing. 440.

A number of bales of bacon lying at a wharf were sold and weighed by the vendor, and set apart for the purchaser, and the price was fixed, and was to be paid by bill at two months; and an order was given to the wharfinger to deliver the goods to the purchaser, who went to the wharf, and presented the order, and with the assent of the wharfinger took possession of them, and weighed *the whole*, and took away part, but became bankrupt before he had removed the residue, whereupon the vendor countermanded the delivery order; it was holden that the order having been executed, and the goods actually delivered under it to the purchaser, they had irrecoverably become the property of the latter, and the vendor had no more to do with them afterwards than a perfect stranger, and could not consequently countermand the order, and prevent the purchaser from taking away the residue remaining in the hands of the wharfinger. (*p*)

The owner of a quantity of timber which had been felled, entered into the following contract for the sale of a portion of it:—"Bargained and sold Mr. George Jenkins, all the ash at Garmelow, at the price per foot cube, say 1s. 7½*d*. Payment on or before the 29th September, 1834. The above George Jenkins to have power to convert on the land. The timber is now felled."—Six or eight of the trees were measured on the 27th December, and taken away by Jenkins, and shortly afterwards the remainder of the trees were marked and measured, the number of cubic feet in each tree being ascertained, but the total contents were not summed up. Jenkins removed several of the trees, but before the bulk of them was carried away, he became insolvent, whereupon the vendor went and took possession of the residue of the timber, but it was held that he had no right to do so.

"It appears to me," observes Tindal, C. J., "that the delivery of the timber to the purchaser was, under the circumstances, complete. At the time of the contract the trees were cut down and lying on the land, and the purchaser was to be at liberty to convert on the land. If anything remained to be done (as between the vendor and purchaser) to complete the contract, I admit the property would not have passed. But when I find that the trees were marked and measured, and the length and girth of the several trees having been taken by the servants of the vendor, and by Jenkins the purchaser, the cubic feet were then taken, and the figures put down on paper, it seems to me that there was a perfect measurement and ascertainment of the price; the mere omission to add up the contents is too trifling an incident to warrant us in holding that anything remained

a. c. *Wood v. Manley*, 11 Ad. & E. 34.

(*p*) *Hammond v. Anderson*, 4 B. & P. 69.

to be done for the completion of the contract. The question then is, whether or not the vendor had a right to stop the goods, the price not having been paid. He would undoubtedly have had such a right, had the delivery not been complete. By the terms of the bargain the land was made a warehouse for the purchaser," (for the cutting up and conversion of the timber.) "It further appears that the purchaser took away several of the trees as he wanted them: this shows that the vendor had given him a general license to carry them away, and that he did not intend to retain any property in them himself; there has been therefore a complete sale and delivery, and the vendor's interference came too late." (q)

When a sale by a bailee or wrongful possessor shall bind the true owner.—Generally speaking, a person cannot convey to another a better right or title to a chattel than he himself has, and a person who has wrongfully obtained possession of goods, cannot transfer them to another except by a sale in *market overt*. (r) But "if the real owner of property suffer another to have possession of it, and to have those documents which are the muniments of title, a sale by such a person shall bind the true owner." (s) And if the owner of goods voluntarily allows another to treat the goods as his own, whereby a third person is induced to buy them *bonâ fide*, the owner is bound by such sale, and cannot afterwards claim the goods from the purchaser. (t)

Before the price has been paid, the owner is entitled to come forward and adopt the contract, and claim the payment of the price to himself, and the payment to such owner is of course in all cases a defence against an action brought by a person who has sold goods, either under a real or under a false and pretended authority. (u)

The right of restitution of the owner of goods and chattels stolen, or obtained by false and fraudulent pretences, with intent to defraud the owner, and sold to third parties, has been regulated by divers acts of parliament, and the owner prosecuting to conviction is now, it should seem, entitled to the goods, even though they shall have been sold in market overt. (x) There are exceptions in the case of valuable securities, and

(q) *Tindal and Park, J's, Tansley v. Turner*, 2 Sc. 241, 2; 2 Bing. n. s. 151, s. c.

(r) *Bristol v. Wilmore*, 1 B. & C. 514; 2 D. & R. 755, s. c. *Noble v. Adams*, 7 Taunt. 59. *Peer v. Humphrey*, 2 Ad. & E. 495, 499. *Wilkinson v. King*, 2 Camp. 335. *Loeschman v. Machin*, 2 Stark. 311. *Lyons v. De Pass*, 11 Ad. & E. 326. *Williams v. Barton*, 10 Moore, 520; 3 Bing. 145, s. c. *Littledale, J., Dixon v. Yates*, 5 B. & Ad. 339.

(s) *Abbott, C. J., Dyer v. Pearson*, 4 D. & R. 653; 3 B. & C. 42. *Pickering v. Busk*, 13 East,

43, 44. *Boyson v. Coles*, 6 M. & S. 26. *Bayley, J., ib.* 23, 24; 5 & 6 Vict. c. 39.

(t) *Gregg v. Wells*, 10 Ad. & E. 90.

(u) Post, ch. 9. Principal and agent. *Dickenson v. Naul*, 4 B. & Ad. 638. *Allen v. Hopkins*, 13 M. & W. 94; 13 Law J. Rep. n. s. (R.) 316, s. c.

(x) 7 & 8 Geo. 4, c. 27, c. 29, s. 57. *Gimson v. Woodfall*, 2 C. & P. 41; 2 Ad. & E. 449; *Kelynge*, 480. *Foxley's case*, 5 Co. Rep. 109; 2 & 3 P. & M. c. 7; 31 Eliz. c. 12; 2 & 3 Vict. c. 71, s. 27, 28, 29.

negotiable instruments transferred *bona fide* for a valuable consideration, and without notice or suspicion.

Colourable sales to defraud creditors.—By the acts of 13 Eliz. c. 5, and 29 Eliz. c. 5, which are, however, merely declaratory of the common law, it is enacted that all gifts, bargains, and conveyances of goods and chattels, made with intent to defraud or delay creditors, shall be utterly void as against the parties intended to be defrauded and delayed.

Any bargain and conveyance of goods and chattels made by a person in debt, whether it be by deed or simple contract, is *primâ facie* fraudulent, unless it be accompanied with a transfer of the *possession* of the things sold. (y) Where, therefore, a debtor by a bill of sale bargained and sold to his creditor all his household furniture, medicines, stock in trade, goods, chattels, and effects in his dwelling-house; and upon the execution of such bill of sale, handed a corkscrew to the purchaser, as a symbolical delivery, and constructive transfer of the possession of the goods and chattels so sold, but the debtor still continued in the actual possession and enjoyment of them, it was holden that the bill of sale was void. (z) But this *primâ facie* presumption of fraud may of course be rebutted by contradictory evidence, and the parties are at liberty to show, if they can, from surrounding circumstances and the general nature of the transaction, that the sale was not merely colourable or fraudulent, or made with a view of delaying or defeating the claims of creditors, but that the transaction was *bona fide*, and that the party who claims the goods has actually bought and paid for them, or has made himself liable to pay for them with his own money; and the sale and transfer, however fraudulent and void as against creditors, is operative as between the immediate parties to it, and all such persons as are privy and consenting to the transaction. (a)

(y) *Twyne's case*, 3 Co. 80; Moore, 638, s. c. *Meggott v. Mills*, 1 Ld. Raym. 286. *Wordall v. Smith*, 1 Campb. 333. *Paget v. Pritchard*, 1 Esp. 204.

(z) *Edwards v. Harben*, 2 T. R. 587.

(a) *Leonard v. Baker*, 1 M. & S. 251. *Dawson v. Wood*, 3 Taunt. 256. *Kid v. Rawlinson*, 2 B. & P. 59. *Woodham v. Baldock*, 3 Moore, 11. *Eastwood v. Brown*, 1 R. & M. 312. *La-*

timer v. Batson, 7 D. & R. 106; 4 B. & C. 652, s. c. *Reed v. Blades*, 5 Taunt. 212. *Dewey v. Bayntun*, 6 East, 257. *Martindale v. Booth*, 3 B. & Ad. 498. *Benton v. Thornhill*, 7 Taunt. 149. *Hawes v. Leader*, Cro. Jac. 271. *Robinson v. M'Donnel*, 2 B. & A. 134. *Steel v. Browne*, 1 Taunt. 381. *Doe v. Roberts*, 2 B. & A. 367.

SECTION II.

AUTHENTICATION OF THE CONTRACT OF SALE BY WRITING WHEN
NECESSARY.

When the subject matter of the sale is of the value of 10*l.* and upwards, and the contract has not been consummated by actual delivery, the legislature has, to the requisites previously mentioned as essential to the due formation and establishment of the contract, superadded the necessity of a part acceptance and receipt of the things sold, or a giving of earnest, or a part payment of the price, or an authentication of the contract by writing.

By the 17th section of the act of 29 Chas. 2, ch. 8, commonly called the statute of frauds and perjuries, it is enacted, "that no contract for the sale of any goods, wares, and merchandizes, for the price of *ten* pounds sterling or upwards, shall be allowed to be *good*, except the buyer shall accept *part of the goods* so sold, and actually receive the same, or *give something in earnest* to bind the bargain, or in part payment, or that some *note or memorandum in writing* of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

This section was held not to extend to contracts for the making and manufacture of goods, i. e. contracts to make and complete and deliver at some subsequent period goods not in existence, and consequently not capable of delivery, or of part acceptance, at the time of the making of the contract; such as contracts to build a ship, or make a chariot, &c., and which were considered to be contracts for work and labour, and the supply of materials, rather than contracts of sale; (a) whereupon the statute of 9 Geo. 4, c. 14, s. 7, was passed, which extends the provisions of the statute of frauds respecting the sale of goods to all contracts for the sale of goods of the value of 10*l.* and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, and rendering the same fit for delivery."

(a) *Groves v. Buck*, 3 M. & S. 178.

Consummated contracts of sale, upon which an action can be maintained for goods sold and *delivered*, do not of course come within the scope and provisions of these acts of parliament. (b) But where the contract is of an *executory* nature, and the transfer of *possession* is not complete, the statutes attach, and there can be no action upon the contract either by the vendor or purchaser, unless the requirements of them have been complied with. (c)

Acceptance and receipt within the meaning of the statute.—If there has been no actual delivery of the thing sold, there can have been no acceptance and receipt of it.

A hogshead of wine in the warehouse of the London Dock Company was sold for 19*l.*, and a delivery order was handed to the purchaser, but was never presented by him at the docks, nor recognized by the dock-keeper, and it was held that the acceptance by the purchaser of the order was not an acceptance of the wine. "There could not have been," observes Abbott, C. J., "any actual acceptance of the wine by the vendee, until the Dock Company had accepted the seller's delivery order, and by so doing assented to hold the wine as the agents of the buyer It has been said that the delivery order in this case was a symbol of property, and constituted an actual delivery of the goods, like the key of a warehouse, as put by Lord Kenyon; but, as it appears to me, they are mainly different; for the key at once gives the holder the actual access to, and possession of the goods, whereas the delivery order was wholly useless, until it was accepted by persons who might by possibility refuse to accept it." (d)

As long as the vendor retains his right of lien for the price over the *whole* commodity sold, there has been no such acceptance and receipt as the statute requires." (e)

The defendant, whilst on a visit at the plaintiff's house, agreed to purchase a horse of him at the price of forty-five guineas, and to fetch it away on the 22d of September, as he went to Doncaster races. The defendant quitted the plaintiff's house soon after the bargain had been made, and returned again on the 20th of September. The horse was then taken out of the stable by his orders, and was mounted, galloped, and leaped both by himself and servant; it was afterwards cleaned by the latter, and the defendant gave directions that a roller should be taken off, and a fresh one put on, and that a strap should be put round the neck,

(b) *Searle v. Reeves*, 2 Esp. 598.

(c) *Alexander v. Komber*, 1 H. Bl. 21.

(d) *Bentall v. Burn*, 5 D. & B. 284; 3 B. &

C. 423, s. c.

(e) *Maberley v. Sheppard*, 3 M. & Sc. 442.

which was consequently done; and the defendant then asked the plaintiff's son if he would keep the horse another week, which he said he would do, to oblige him. The defendant returned on the 27th to take the animal away, but found that it had died on the preceding day, whereupon he refused to pay the price; and it was held that there had been no acceptance of the horse within the meaning of the statute of frauds. "It is said," observed Holroyd, J., "that the riding of the horse by the defendant on the 20th of September, and the directions then given, were evidence of acts of ownership, and were therefore evidence of an acceptance of the horse; but at that time the defendant had no right to take away the horse. There is no evidence to show that the plaintiff had ever parted with the possession or control; and if he had not, he had a lien for the price, and the defendant could not be justified in taking the horse away until the price had been paid." . . . "The acts, therefore, also," observes Best, J., "done on the 20th of September, could not be acts of ownership, for at that time the defendant had acquired no right to exercise any act of ownership. (f) So, where an oral contract was made for the sale of a horse for 30*l.*, and the animal was fired in the presence, and with the approbation, of the purchaser; and it was then agreed that it should be kept by the vendor for twenty days, without any charge being made for the keep, and at the expiration of that time it was, by the defendant's directions, taken by the vendor's servant to Kimpton Park, to be turned out to grass there, and was there entered, by the defendant's desire, in the *vendor's* name, as the defendant did not wish it to be known that he kept a racehorse; it was held, that there was no acceptance of the horse within the statute. (g)

The defendant ordered the plaintiff, who was a wheelwright, to make him a waggon, and whilst it was in progress of construction, the defendant employed and paid a smith to furnish and affix certain iron-work thereon, and also a tilt-maker to put on a tilt, but the waggon still remained on the premises of the plaintiff, and it was contended that the exercise of these acts of ownership by the defendant over the waggon, amounted to an acceptance of it within the meaning of the statute; but it was held, that as the acts relied on were performed before the waggon was finished and capable of delivery, and the waggon afterwards remained on the plaintiff's premises to be finished by him, and the latter retained his lien upon it for the price, the requisites of the statute had not been complied with. (h)

(f) *Tempest v. Fitzgerald*, 3 B. & Ald. 684, 685.

(h) *Maberley v. Sheppard*, 3 M. & Sc. 436; 10 Bing. 99, *n.c.*

(g) *Carter v. Toussaint*, 5 B. & Ald. 855.

The owner of a coppice had given orders for some ash trees to be felled, and whilst they were being cut down, the defendant came to the coppice and agreed to purchase the timber at so much a foot. The trees were marked and numbered, and the defendant gave some directions to the workmen as to the mode in which they were to be cut. The timber was subsequently measured, and the measurement communicated to the defendant, who then offered to sell the butts of the trees, which he alleged he had also bought of the plaintiff, and declared it to be his intention to convert the tops into building stuff. The defendant, however, afterwards refused to remove the timber and pay the price, and it was held that there had been no acceptance and receipt of it by the defendant within the meaning of the statute. (i) There was no actual transfer of the *possession* of the timber, or any part thereof, and the vendor, consequently, had not lost his right of *lien* over the *whole* commodity sold.

The defendant gave a verbal order to the agent of the plaintiff for a quantity of goods, at a stipulated price, to be paid for on delivery. On receiving notice of the arrival of the goods at the agent's warehouse, the defendant went there and ordered a boy, whom he saw there, to put a certain mark on the goods, and to send them to the St. Katharine's docks. The next day an invoice was delivered to the defendant, charging the articles at 12s. *each*, and the defendant then repudiated the contract, and refused to pay the price, alleging that he had understood that the articles were to be 12s. a *dozen*; and it was held that there had been no acceptance and receipt within the meaning of the statute. "To take the case out of the 17th section of the act," observes Parke, B., "there must be both *delivery* and *acceptance*, and to constitute a delivery, the possession must have been parted with by the owner, so as to deprive him of the right of *lien*." . . . "The acceptance," also observes Lord Abinger, "to be effectual under the statute, should be such as to divest the property in the goods out of the seller. Here the defendant probably meant to accept them, and to make Harvey his agent for shipping them. But the latter was at liberty to say that he would not deliver to or ship for the defendant until the goods were paid for. Therefore, for want of a delivery, there is no sufficient acceptance of these goods. (k)

So long, also, as the buyer continues to have a right to object either to the quantum or the quality of the goods, there has been no acceptance and receipt within the meaning of the statute.

An oral agreement was entered into at a market between the plaintiff

(i) *Smith v. Surman*, 9 B. & C. 561, 577; 4 M. & R. 455, 470.

(k) *Bill v. Bament*, 9 M. & W. 40, 41.

and the defendant, for the purchase by the latter of twelve bushels of tares, at 1*l.* per bushel, the defendant to send to the plaintiff's farm to fetch them away. A sample of the tares had been offered the defendant, but he declined taking it, saying that he had seen the tares on the plaintiff's premises, and he requested, as he had no immediate use for them, that they might remain there until he wanted to sow them, which was agreed to. The plaintiff on his return home caused the twelve bushels of tares to be measured out and set apart in his granary, and gave orders that they should be delivered to the defendant when he sent for them, but the defendant never sent, and, the action being brought for the price of the tares, it was held that as the defendant, if he had gone to the granary, would have had a right to object to the quality of the tares, if they were found on inspection not to correspond with the description given of them, there was no acceptance and receipt by the buyer within the meaning of the statute.^(l)

The acceptance and receipt of a carrier or wharfinger, appointed by the purchaser to be the vehicle of transmission to him, are not the acceptance and receipt of the purchaser himself.

Longstaff, a cornfactor, made an oral sale on the 1st of November, of a quantity of barley, the property of the plaintiff, to the defendant, at the price of 38*s.* per quarter, to be delivered at Derby. The barley at the time of the sale was in the hands of Turner, for the purpose of being kiln-dried, and Longstaff having a warehouse at Derby, it was agreed that it should be delivered at such warehouse, and be sent by the first of Longstaff's boats, which went from Nottingham to Derby. The 38*s.* per quarter was a higher price, on account of the delivery having to be made at Longstaff's expense. The defendant went to Turner, told him he had bought the barley, and desired him to see it measured and delivered and put up properly. Two or three days afterwards, the barley was sent by Longstaff's first boat, and on the 26th of November, Longstaff's clerk saw the defendant at Derby, and delivered him the invoice, and the defendant took it, and requested a week longer to pay the money, which was allowed him. On the same day, however, he gave notice that he would not accept the barley, and it was held, that the defendant's having directed the mode of conveyance, and pointed out the particular boat, and employed Turner to look to its delivery on board the boat, did not amount to an acceptance on his part. ^(m)

An oral order was given by the defendant, a grocer in Yorkshire, to the plaintiffs, who were wholesale tea-dealers in London, for two chests of tea,

^(l) *Howe v. Palmer*, 3 B. & Ald. 321. *Acebal v. Levy*, 4 M. & Sc. 229.

^(m) *Astey v. Emery*, 4 M. & S. 262.

to be sent by the usual conveyance. The tea was accordingly sent to Hanson's wharf, to be forwarded to the defendant, and was there received and duly shipped, but the vessel was lost on the passage, and it was held that there was no acceptance by the defendant within the meaning of the statute. (*n*) And even if a purchaser sends his own servant for goods, and after they have been brought to him, sends them back as not answering the description, there is no acceptance, although the goods may in point of fact correspond with the terms of the bargain. (*o*)

The plaintiff, who was a cider manufacturer, sent a quantity of cider by the carrier's waggon to the defendant, pursuant to an oral order given by the latter; the cider was proved to be good cider for the price, nevertheless, the defendant on its arrival refused to take it in, and caused it to be lodged in an adjoining warehouse, the property of a third party; no notice was ever sent to the plaintiff of the defendant's refusal to take the cider, and the former brought his action for the price of it; but it was held that there had been no acceptance, and the sale, consequently, was void by the statute. (*p*)

Neither is the delivery of the goods into the hands of the intended purchaser sufficient, if it appears that the latter has taken them and had them in his possession for no greater time than would reasonably suffice for him to examine the quantity and quality of the goods, and declare his approval or disapproval thereof, and consequent final acceptance or non-acceptance of the article.

A retail vendor of sponge gave an oral order to a wholesale dealer in London for a bale of sponge, to be sent to him in the country, the price of which amounted to 75*l*. The sponge was returned, accompanied by a letter from the intended purchaser, saying he had sent it back, as he did not think it worth the price charged, and it was held that there had been no acceptance and receipt of the article within the meaning of the statute. "The evidence," observes Lord Alvanley, C. J., "does not take this case out of the statute of frauds. How is any judgment to be formed of the nature of the contract between these parties? Possibly the order was for the best, possibly for the second-best sponge, or sponge of some peculiar quality; all which circumstances are left in a state of uncertainty. It was this very uncertainty, and the frauds to which it might lead, that the statute had in contemplation and meant to guard against. The only affirmance of any contract to be collected from the evidence, is an affirmance of some

(*n*) *Hanson v. Armitage*, 5 B. & Ald. 557; 2 M. & W. 656.
 1 D. & B. 128, s. c. (*p*) *Nichol v. Plume*, 1 C. & P. 272.
 (*o*) Lord Abinger, C. B., *Johnson v. Dodgson*,

sort of order for some sort of sponge, and it appears that the moment the article reached the defendant and was examined, he sent it back to the plaintiff, saying it was not that sort of sponge which he wanted, and had ordered. There is therefore nothing that can be construed into an acceptance, to bring the case within the exception which has been relied on." (q)

The delivery on the one side, and the acceptance and receipt on the other, must clearly appear to have been made with the intention of transferring the *possession* of the subject matter of the sale from the one to the other, and the purchaser must have received the thing sold, and accepted it with the intention of acquiring the possession thereof as owner. (r) If a man, therefore, merely takes the article on examination or trial, and returns it within a reasonable period, there is no acceptance, within the meaning of the statute. (s) And if a small quantity of the article, but no more of it than was absolutely necessary, has been used for the purpose of testing its quality by experiment, such user does not constitute an acceptance and receipt of the entire commodity. (t)

By one of the printed conditions of a sale by auction, it was provided that the highest bidder should be declared the purchaser, and that on being so declared, he should pay down 20*l.* per cent. deposit on the purchase-money. A pair of ear-rings was put up for sale, and the defendant bid for them, and during the biddings he had them in his hands and looked at them, and at last, he being the highest bidder, they were knocked down to him at the price of eighty-eight guineas, and were immediately delivered into his hands. In a few minutes the defendant handed them back and declined the purchase, on the ground that he had been mistaken in the value of the stones with which they were set, thinking them at first sight to be *rubies*, whereas they turned out on further examination to be *garnets*, and it was held, that inasmuch as by the conditions of sale the defendant could have no right to remove the goods until the deposit was paid, the mere delivery of them into his hands the moment he was declared the purchaser, was not of itself evidence of an intention to part entirely with the possession of the goods, and place them at the final disposal of the purchaser, and that there was not consequently a complete delivery in law of the goods, nor such an acceptance and receipt of them as were necessary to satisfy the statute. (u)

A man entered a tradesman's shop and selected various articles, amount-

(q) *Kent v. Huskisson*, 3 B. & P. 232, 235.

(r) *Howe v. Palmer*, 3 B. & Ald. 326.

(s) *Jordan v. Norton*, 4 M. & W. 155. *Per-*

cival v. Blake, 2 C. & P. 514.

(t) *Elliott v. Thomas*, 3 M. & W. 177.

(u) *Phillips v. Bistolfi*, 3 D. & R. 822; 2 B. & C. 511, s. c.

ing together to the price of 70*l.*, some of which he marked with a pencil, and others were cut by his directions from piece-goods, and laid aside for him. The articles were afterwards sent to his house, but he refused to take them, and it was held that there was no complete delivery of the goods, nor any acceptance and receipt of them within the meaning of the statute! (*x*)

It has been held, on the other hand, that there has been an actual transfer of the possession, and consequent acceptance and receipt of the goods, and consummation of the contract of sale in the following cases.

A couple of horses were sold by a horse-dealer and livery-stable keeper, at a fixed price, and the purchaser told the vendor, that as he had neither servant nor stable, the vendor must keep the horses at livery for him, whereupon the latter removed them from his *sale*-stable to his *livery*-stable, and there kept them; and it was held that this amounted to an actual delivery of the horses, that the vendor had parted with the possession of them, lost his lien for the price, and held the horses only as any other livery-stable keeper might have held them. (*y*)

Some wool was bought by the defendant of the plaintiff at an agreed price, and was removed to the warehouse of a third party, where it was weighed and packed, but not paid for. It was the usual course for the wool to remain at this place till paid for; it was held, nevertheless, that there had been an actual delivery, and an acceptance and receipt within the meaning of the statute. (*z*)

Goods of the plaintiff being intrusted to the defendant to sell, the latter agreed to buy them himself at the invoice price, less a discount of 15 per cent., and afterwards sold the goods in his own name and on his own account, and in a written account-current rendered to the plaintiff, he debited himself with the price of the goods as "sold," and it was held that the jury were warranted in inferring from these facts an actual acceptance of the goods by the defendant, and a taking possession of them by him as owner, and that an action, consequently, might be maintained by the plaintiff against the defendant for the price of the goods as sold and *delivered*. (*a*)

The exercise of acts of ownership over the subject matter of sale, is a circumstance from which a jury may reasonably infer an actual acceptance and receipt thereof. A stack of hay was sold under an oral contract of sale, and the purchaser afterwards sold part of the stack to a third party,

(*x*) *Balday v. Parker*, 3 D. & R. 220; 2 B. & C. 44, s. c. *Belcher v. Capper* 5 Sc. n. s., 316.

(*y*) *Elmore v. Stone*, 1 Taunt. 458.

(*z*) *Dodsley v. Varley*, 12 Ad. & E. 632.

(*a*) *Edan v. Dudfield*, 1 Ad. & E. n. s. 302.

and it was held that this was a circumstance from which the jury were warranted in finding a delivery of the haystack on the part of the vendor, and a consequent acceptance and receipt of it on the part of the purchaser. (*b*)

Part acceptance and receipt.—"Where the acceptance of a part of goods sold is relied upon to take the case out of the statute of frauds, it must be an acceptance of a part of goods, bought under one entire contract." Where, therefore, the traveller of a mercantile house in London received and accepted an order in the country from a carpet-manufacturer, for a cask of cream of tartar at a fixed price, and also an order for two chests of lac dye, provided they could be furnished at a given price, and reserved to his employers a right to decline to fulfil the contract for the lac dye at the price named, if they should think fit, and the cream of tartar and the chest of lac dye being forwarded, the manufacturer accepted the cream of tartar, but refused to take the lac dye, it was held that there were two distinct and independent contracts of sale, one for the cream of tartar, which was entire and absolute, and the other for the lac dye, which was conditional and dependent, and that the acceptance of the cream of tartar could not take the contract as to the lac dye out of the operation of the statute. (*c*)

Generally speaking, however, when a person goes into a shop and buys various different articles at the same time, such a person does not make as many different contracts as there are articles purchased; (*d*) but one contract for the whole, and the acceptance and receipt of any one of the articles so purchased, will take the contract as to all of them out of the operation of the statute.

The traveller of a steel manufacturer at Sheffield, took an oral order from an edge-tool maker at Birmingham, for thirty-five bundles of common steel at 34*s.*, and five bundles of cast steel at 48*s.*; and it was held, that this was one entire contract, and that the acceptance of the common steel, consequently, took the cast steel out of the operation of the statute. (*e*) But where growing crops were put up to auction in several lots, and separately knocked down to a bidder at separate prices, it was holden, that there was a distinct contract of sale as to each lot. (*f*)

Where a party under one contract purchases goods ready made, and

(*b*) *Chaplin v. Rogers*, 1 East, 191. *Blenkinsop v. Clayton*, 7 Taunt. 597.

(*c*) *Price v. Lea*, 2 D. & R. 295; 1 B. & C. 158, s. c.

(*d*) *Alderson*, B., 12 M. & W. 38; 3 M. & W. 178. *Balday v. Parker*, 3 D. & R. 220; 2 B. &

C. 111.

(*e*) *Elliott v. Thomas*, 3 M. & W. 176. *Rohde v. Thwaites*, 9 D. & R. 293; 6 B. & C., 388.

(*f*) *Roots v. Lord Dormer*, 4 B. & Ad. 77; 1 N. & M. 667, s. c.

orders others to be made, an acceptance of the former goods is a sufficient compliance with the statute of frauds, and the Act of 9 Geo. 4, c. 14, s. 7. "The two statutes must be considered as incorporated, and then it is plain, that where an order for goods made and for others to be made forms one entire contract, acceptance of the former goods will take the case out of the statutes, as regards the latter also." (g)

Certain sugars in a warehouse were advertised for sale by auction, and *samples* of half a pound weight from each hogshead, drawn *after* the sugars had been weighed, were produced to the assembled bidders, and after the biddings were closed, the samples were delivered to and accepted by each purchaser, as part of his purchase, to make up the quantity and weight of each lot, as specified in the catalogue, and it was held, that the delivery and acceptance of the sample, was an acceptance and receipt of *part of the thing sold*, so as to remove the contract from the operation of the statute. "Inasmuch as the half-pound sample of sugar," observes Lord Ellenborough, "is, by the terms and conditions of sale, so far treated as part of the entire bulk to be delivered, that it is considered in the original weighing, as constituting *a part of the bulk actually weighed out to the buyer*; and to be allowed for specifically, if he should choose to have the commodity re-weighed. I cannot but consider it as *a part of the goods sold under the terms of the sale, accepted and actually received as such by the buyer*. And, although it be delivered partly *alio intuitu*, namely, as a sample of quality, it does not therefore prevent its operating to another consistent intent also, in pursuance of the purpose of the parties, as expressed in the conditions of sale, namely, *as a part delivery of the thing itself*, as soon as, in virtue of the bargain the buyer should be entitled to retain and should retain it accordingly." (h)

The acceptance takes the whole contract out of the statute; if, therefore, the contract is made defeasible on certain conditions, the condition will stand good as part of the contract.

A mare was sold on the terms, that in case she should prove in foal, she should be returned, together with part of the price; the mare was delivered and accepted, and afterwards proved to be in foal, but the purchaser refused to return her, and it was held, that the acceptance took the whole agreement out of the statute of frauds, and that the plaintiff might sue the defendants for the refusal to return the mare. (i)

Earnest and part payment.—The giving of any quantity of money,

(g) Lord Abinger, C. B., *Scott v. Eastern Counties Railway Company*, 12 M. & W. 38.
(h) *Hinde v. Whitehouse*, 7 East, 570. Tal-

ver v. West, Holt, 178.

(i) *Williams v. Burgess*, 10 Ad. & E. 499.

however small, by way or earnest and part payment, has the effect of taking the contract out of the operation of the statute. It binds the bargain as between the parties, provided the other requisites necessary to the completion of a contract of sale have been duly complied with, and operates as a transfer of the right of property to the purchaser. (*k*) The vendor cannot sell to another until he has requested the vendee to remove the goods and pay the price, and the latter has neglected to comply with the requisition within a reasonable period. (*l*) But the payment of earnest or a part payment does not, as before mentioned, in any way affect the vendor's rights of lien for the price. (*m*)

The civil law respecting *earnest*, provides that "if earnest has once been given, the sale is perfected, whether the contract be in writing or be made merely by word of mouth." "If the buyer neglects to perform the contract, he loses what he has paid as earnest, and if the seller makes default, he is bound to render to the buyer double the value of what he has received. But the price of the thing sold must always be fixed, for without a price there can be no sale." (*n*)

Requisites of the note or memorandum of the contract.

The note or memorandum of the bargain must state the names of the contracting parties or their agents, (*o*) and the price to be paid, if the price was fixed and agreed upon at the time of the making of the contract, (*p*) but if no price was positively and definitely fixed and agreed upon, the note or memorandum will be sufficient, in the case of the sale of a chattel, without any statement of price, and the law will infer that a reasonable price was to be paid. (*q*) It is not necessary that all the minutiae and particulars of the contract should appear upon the face of the written memorandum, any note, or an entry in a book or ledger, acknowledging the fact of the sale, mentioning the name of the vendor and the thing sold, and signed by the purchaser or his agent, will take the case out of the statute.

The contract may be authenticated and established through the medium of letters and separate writings, provided they refer to each other and to

(*k*) *Back v. Owen*, 5 T. B. 409. *Blakey v. Dinadale*, Cowp. 664.

(*l*) *Langfort v. Admr. of Tiler*, 6 Mod. 162.

(*m*) *Goodall v. Skelton*, 2 H. Bl. 316. *Blenkinsop v. Clayton*, 7 Taunt. 597; *Anon. Dyer*, 29 b.

(*n*) Institut. *Justiniani*, lib. 3, tit. xxiv. *De emptione et venditione*. Dig. xviii. xix. T. 1, Cod. iv. T. 38, 40.

(*o*) *Champion v. Plummer*, 4 B. & P. 254. *Graham v. Musson*, 5 Bing. N. S. 605, 7 Sc. 769, s. c.

(*p*) *Elmore v. Kingscote*, 5 B. & C. 583; 8 D. & R. 343, s. c.

(*q*) *Hoadly v. MacLaine*, 4 M. & Sc. 340; 10 Bing. 482, s. c. *Acebal v. Levy*, ib. 227, 217.

the same persons and things, and manifestly relate to the same contract and transaction.

A bill of parcels, for example, in which the vendor's name is printed, delivered to the purchaser at the time of an order given for the future delivery of goods, may be connected with a subsequent letter written by the vendor, referring to such order for the purpose of establishing the requisite written evidence of the contract. (r)

The agent of the seller had written in a book of the buyer, an order for fifty barrels of rice at a certain price, and beneath this order two several similar orders for twelve hundred weight and for eight hundred weight of tobacco, but not naming the buyer, and it was held, that a subsequent letter from the buyer to the seller, in which he said, "the eight hundred weight of fine shag tobacco I wish immediately forwarded, as I have sold it, and it is wanted: I likewise want the invoice of the rice and the other tobacco," might be connected with the orders, so as to make a complete memorandum in writing within the statute. (s)

Goods were sold by auction to an agent acting on behalf of an undisclosed principal, the auctioneer wrote the initials of the agent's name, together with the prices, opposite the lots purchased by him, in the printed catalogue; and it was held, that the entry in the catalogue and a letter afterwards written by the principal to the agent, recognizing the purchase, might be coupled together to constitute and establish the requisite written memorandum of the contract. (t)

The buyer wrote to the seller as follows:—"I give you notice that the corn you delivered to me, in part performance of my contract with you for one hundred sacks of good English seconds flour, at 45s. per sack, is so bad, that I cannot make it into saleable bread. Dated this 24th September, 1821." To this notice the seller replied as follows:—"I have your letter or notice of the 24th September, in reply to which I have to state that I consider I have performed my contract with you as far as it has gone." And it was held, that the first letter and the answer might be coupled together and incorporated, and were sufficient evidence in writing to satisfy the terms of the statute of frauds, and enable the buyer to sue the seller for the non-delivery of an article corresponding with that mentioned and described in the buyer's letter. (u)

But, if there is any material discrepancy between the letters and entries, if they describe the quality and quantity of the thing sold dif-

(r) *Saunderson v. Jackson*, 2 B. & P. 238.

(s) *Allen v. Bennett*, 3 Taunt. 169.

(t) *Phillimore v. Barry*, 1 Campb. 513.

(u) *Jackson v. Love*, 7 Moore, 219, 228; 1 Bing. 9, s. c.

ferently, or vary in the statement of the terms of the contract, and do not recognise the same contract and refer to the same transaction, they will, of course, fail in establishing the bargain.

In an action for the price of goods sold, the plaintiff offered in evidence an entry in a book of an order for flour, which had been read over to the defendant, the alleged purchaser, at the time of the booking thereof, and which purported to be a mere general order for forty sacks of flour called *thirds*, at 58s. per sack, and this order being insufficient as a memorandum for want of signature, the plaintiff endeavoured to satisfy the statute by connecting it with a letter signed by the defendant, addressed to him, stating, "Your not sending the flour I agreed with you for, *according to time*, I am now provided for. . . I expected yours in the course of a *week*. If I buy of any man I expect it *according to time*, or the bargain is void." And it was held, that the entry and the letter referred to different contracts, the one was evidence of an absolute and unconditional contract of sale, and the other of a qualified and conditional bargain, and that the plaintiff could not avail himself of the letter for one purpose,—to bind the defendant within the statute, and renounce it for another purpose; but that he must take it altogether, and then it was no *recognition*, but a *repudiation* of the contract sought to be established by the entry. (x)

So, where a purchaser had bought some timber, but afterwards refused to accept it, on the ground that it was faulty and unsound, and the vendor's attorney wrote to him demanding payment of the price, and telling him that "the trees contained, upon a very fair admeasurement, 229 feet 7 inches," and that "the value at 1s. 6d. per foot, amounted to the sum of 17l. 3s. 6d.;" and the purchaser wrote in reply, "I bought the timber at 1s. 6d. per foot, *to be sound and good*, Mr. Smith promised to make it so, and now *denies it*." And it was held, that this reply did not recognise the contract described in the first letter, but distinctly falsified and repudiated it. (y)

Brokers' bought and sold notes.—When sales are effected through the medium of brokers acting between the parties buying and selling, "the broker is the agent of both parties, and as such, may bind them by signing the same contract on behalf of buyer and seller. But if he does not sign the *same* contract for both parties, neither will be bound. It has been decided accordingly, that where the broker delivers a different note of the contract to each of the contracting parties, there is no valid bargain at all. (z)

(x) *Cooper v. Smith*, 15 East, 103, 108.
Richards v. Porter, 6 B. & C. 437.

(y) *Smith v. Surman*, 9 B. & C. 561, 569.

(z) Lord Tenterden, C. J., *Grant v. Fletcher*,

"If different notes are given to the parties, neither can understand the other;" (a) nor can either of them tell whether the broker has or has not exceeded the authority given to him.

A broker's bought note delivered to a purchaser described the subject matter of the contract as "Riga Rhine hemp," and the sale note delivered to the vendor described it as "St. Petersburg clean hemp;" and it appeared that the description in the first note had been inserted by mistake, and designated an article of a different and better quality and higher price and value than that described in the second note; and it was held, that as the parties were not bound to the same bargain, and had not respectively agreed to buy and sell the same thing, there was no contract at all subsisting between them. (b)

It is the duty and general practice of brokers to make a minute or memorandum of the contract of sale in their books, and to transcribe therefrom the bought and sold notes which are delivered to the vendor and purchaser. If these notes agree, but differ from the entry in the book, the notes constitute the contract, and are not in any way affected by the entry. (c) If they differ from each other, and one of them agrees with the entry, a question has been raised, as to whether the entry and the note agreeing with it, may be taken together as constituting the contract, to the exclusion of the other note; but it seems to be considered that an entry in a book which the party has not seen, cannot be set up in opposition to the note which has been given to him, as evidence of the contract by which he is to be bound, and that the broker's book cannot be resorted to, to cure a material discrepancy between the bought and sold notes, (d) "unless it be shown that the broker's book was *known to the parties*." (e)

Of the signature to the memorandum.—"The words of the statute are satisfied if there is some note or memorandum of the bargain *signed by the party to be charged by such contract*, his signature to it is all that the statute requires." (f) The contract is sufficiently authenticated, if it has been recognised in writing by the party sued upon it; it is no objection to the maintenance of the action, that the defendant himself cannot enforce the

5 B. & C. 437. *Hinde v. Whitehouse*, 7 East, 569. *Heyman v. Neale*, 2 Campb. 337. Lord Denman, C. J., 4 Ad. & E. N. S. 747. Lord Abinger, C. B., 9 M. & W. 805, 809.

(a) Gibbs, C. J., *Cumming v. Roebuck*, Holt, N. P. C. 173. But an unimportant or immaterial variation will not of course avoid the bargain, *Maclean v. Dunn*, 1 M. & P. 778, 779.

(b) *Thornton v. Kempster*, 5 Taunt. 786, 788.

(c) *Hawes v. Foster*, 1 Meod. & Rob. 368. *Goan v. Affalo*, 9 D. & B. 148; 6 B. & C. 117, s. c.

(d) *Thornton v. Meux*, 1 Meod & Malk. 43. *Cumming v. Roebuck*, Holt, 173. *Gregson v. Ruck*, 4 Ad. & E. N. S. 747.

(e) Lord Abinger, C. B., *Thornton v. Charles*, 9 M. & W. 803, 809.

(f) Lord Ellenborough, C. J., *Egerton v. Matthews*, 6 East, 307.

same contract against the plaintiff, because the plaintiff has never signed it. (g) It has been urged, that there is a want of mutuality if the writing has not been signed by *both* parties, and the defendant has not the benefit of his adversary's liability upon the instrument, but the contract is complete at common law by consent of the parties; the statute merely provides and regulates the mode of *authentication*, and the words and object of the act are completely satisfied and attained, when the written recognition of the bargain bears the signature of the defendant, "the party to be charged." (h)

If the note or memorandum of the contract is in the handwriting of "the party to be charged" thereon, his name, written by himself, in the body of the instrument, is a sufficient *signature*, and so also is any stamp or mark made by him upon any note or memorandum of the bargain drawn up in the handwriting of a third party. (i)

John Dodgson, a hop merchant in Leeds, agreed with the traveller of the plaintiffs, who were hop merchants in London, for the purchase of a quantity of hops, and made an entry in his own sample-book, of the quality, quantity, and price of the article, describing it as "*Sold to John Dodgson*," and then required the traveller of the plaintiffs to sign the memorandum on their behalf, as the vendors, which he did, and the hops were duly forwarded; but *John Dodgson* then refused to accept them and pay for them, and it was held that the entry "*Sold, John Dodgson*," in his *own handwriting* was a memorandum of the contract *signed* by the party sought to be charged, within the meaning of the statute. (k)

The civil law did not require the signature of a party to a written contract of sale, if the contract was in *his own handwriting*. "With regard to those contracts of sale and purchase, which are perfected by writing, we have ordained," observes the emperor in the Institutes, "that they shall not be valid and binding, unless they be *written by the contracting parties*, or *signed by them if written by another*." (l)

(g) *Allen v. Bennett*, 3 Taunt. 169.

(h) *Laythoarp v. Bryant*, 3 Sc. 243, 257; 2 Bing. N. S. 735, s. c. See further as to the signature required by the statute of frauds, the next chapter, sec. 2.

(i) Post, ch. 4, sec. 2.

(k) *Johnson v. Dodgson*, 2 M. & W. 653.

(l) Nisi et instrumenta emptionis fuerint conscripta, vel manu propria contrahentium, vel ab alio quidem scripta, a contrahentibus autem subscripta. Lib. iii. tit. 24.

CHAPTER IV.

OF THE AUTHENTICATION, AND ESTABLISHMENT IN LAW, OF CONTRACTS GENERALLY.

SECTION I.—*Authentication by deed when necessary*—Grants of incorporeal hereditaments and easements—Rights of way, and of fishing and sporting over another's land—Right to the passage of water beneath the surface thereof—Executory donations and gifts—Transfers and conveyances of freehold and leasehold estates, and of uncertain and contingent interests—Partitions, exchanges, and assignments of landed property—Leases and surrenders.

SECTION II.—*Authentication by writing signed by the party when necessary*—Leases—Contracts for an interest in land—Contracts and agreements for the sale and purchase of land—Contracts for the purchase of growing grass, timber, fruit, corn, and hops, and the produce of the soil—Contracts for the sale and purchase of fixtures, railway shares, and shares in joint-stock companies—Contracts for furnished lodgings—Promises by an executor or administrator to pay the debt of his testator or intestate—Acknowledgments of debts barred by statute—Promises by adults to pay debts contracted during infancy—Ratification of simple contracts entered into during infancy—Representations to enable partners to obtain credit, money, or goods—Transfers of ships—Assignment of copyright—Agreements in consideration of marriage—Agreements not to be performed within a year—Promises to answer for the debt, default, or miscarriage of another.

SECTION III.—*Of the nature and requisites of the written memorandum*—Of the form and requisites of a written guarantee—Disclosure of the consideration—Absolute guarantees and proposals or offers to guarantee—Establishment of the written undertaking or agreement through the medium of letters—Oral evidence inadmissible to complete an imperfect memorandum of the contract—Of the signature to the note or memorandum.

SECTION IV.—*Of the necessity of stamps on deeds and simple contracts*—Bills of exchange, promissory notes, and agreements—Exemption in favour of all writings relating to the sale of "goods, wares, or merchandizes"—Also of merchants' letters, &c.—Of the number of the stamps when there are several agreements on one sheet of paper—Of stamping contracts after their execution and re-stamping them in case of alteration.

SECTION I.

AUTHENTICATION BY DEED WHEN NECESSARY.

Grants of incorporeal hereditaments, such as advowsons, tithes, rights of commons, rights of way, franchises, rents, annuities issuing out of

land, &c., must, by the common law, in order to be valid and effectual, be made by DEED.

As no corporal possession can be had of such things, they are not capable of manual delivery or of actual occupation, and cannot consequently be transferred like land, or a chattel, by *livery of seizin*. There can be no visible transfer and transmutation of the possession and ownership of them, and they are said therefore not to lie in *livery*, but in *grant*. (a) A parol grant or assignment of an incorporeal hereditament made by writing, signed by the party, might indeed, if founded upon a valuable consideration and expressed in writing, be good as a contract or agreement, to make a grant or assignment thereof, but it cannot operate as an actual transfer of the right or interest.

A *right* to go upon another man's land, whether it be for pleasure or for profit, is a right of an incorporeal nature, lying in grant, and can only be created by DEED. A parol permission or license would, indeed, so long as it had not been countermanded, excuse a trespass, and constitute an answer to any action brought for the entry upon the land, but it can confer no indefeasible right, and may be re-called at the pleasure of the grantor, although a valuable consideration has been given for it.

A parol license and permission to shoot and sport over a manor, or to fish in the waters thereof, whether it be a mere license of pleasure authorising the licensee to *take*, but not to *carry away*, or a license of profit, authorizing him both to take and to *carry off*, the game or the fish, may be revoked at any time, as the right is an incorporeal right lying in *grant*, and can only be created by DEED. (b)

The right to a watercourse beneath the surface of the land, is likewise an incorporeal right, and cannot be created by writing not under seal.

The defendant gave a parol license and permission to the plaintiff to construct a drain through the defendant's yard, and to use such drain as a means of escape for foul and waste water from the plaintiff's premises, and the defendant afterwards, and after the license had been acted upon and executed, and the drain constructed, revoked his license and stopped up the drain, it was held that he was entitled so to do, as the right of passage for waste water claimed by the plaintiff, was an easement and incorporeal right which lay in *grant* and could not be created by parol. (c)

So, where a parol license and permission had been given to the plaintiff

(a) Bac. Abr. Grants, E. Co. Litt. 9 a. 42 a. 875; 8 D. & R. 747, s. c. *Bird v. Higginson*, 14 Vin. Abr. tit. Grant, (G. a.) 2 Rolle Abr. tit. 2 Ad. & E. 696.
Grant (G). *Wood v. Ledbetter*, Jurist, (March 8th, 1845,) 187. (c) *Howlins v. Shippam*, 5 B. & C. 227; 7 D. & R. 794, s. c.

(b) *Duke of Somerset v. Fogwell*, 5 B. & C.

to make a drain and tunnel through the land of the defendant to a spring of water, and to have a free passage for the water to the plaintiff's brewery, and the defendant, some years after the drain and tunnel had been made, caused it to be stopped, and refused to permit any more water to flow through his land, it was held that he was justified in so doing, the license being by parol, and no right having been acquired by user or length of possession. (*d*)

The rector of a parish, in consideration of 20*l.* paid to him by the plaintiff, gave an oral license and permission to the plaintiff to make a vault in the parish church, and consented and agreed that the plaintiff should have the sole and exclusive use of such vault, but afterwards, and after the vault had been constructed at the expense of the plaintiff, the rector, without the leave of the plaintiff, opened the vault, and caused other persons to be buried therein, and it was held, that no action would lie against him for so doing, the right claimed by the plaintiff under the contract, being an incorporeal right, in the nature of an easement, which could only be claimed by prescription as appurtenant to an ancient messuage, or by virtue of a *grant under SEAL* from some person having a right to create or transfer such an interest or easement. (*e*)

A parol license was given by a lord of a manor to a cottager to erect a cottage on a piece of land, part of the waste, rendering an annual rent as a quit rent, and also to inclose a piece of ground, part of the waste, for a garden to the said cottage, and the license was acted upon and executed by the building of the cottage and the inclosure of the ground, but it was held, nevertheless, that the license was revocable at the pleasure of the lord. (*f*)

A parol license to enjoy an easement over, or upon, the soil and freehold of another, is at once determined by a transfer of the property, and the grantee of the license is consequently a trespasser, if he afterwards enters upon the land in the exercise and enjoyment of his supposed right, although he has received no notice of the transfer. (*g*)

Care, however, must be taken to distinguish between a license amounting to a grant of an easement to be exercised and enjoyed by the grantee of such license upon the *grantor's* land, and a license to the grantee to use *his own land* in a way, which, but for an easement claimed thereon by the grantor, he would have had an undoubted right to use it.

(*d*) *Cocker v. Cowper*, 1 C. M. & R. 418.

(*e*) *Bryan v. Whistler*, 8 B. & C. 294, 295.
If the license, however, in this case had been under seal, it would have made no difference, as the incumbent has no power to *grant* such a privi-

lege. *Dawney v. Dee*, Cro. Jac. 605.

(*f*) *The King v. the Inhabitants of Horndon*, 4 M. & S. 562.

(*g*) *Wallis v. Harrison*, 4 M. & W. 539.

In the case of *Winter v. Brockwell*, (h) for example, it appeared that the plaintiff had an easement over the defendant's property, viz. a free passage for light and air across the defendant's area, and had consented to the destruction of such easement, by giving the defendant a parol license to put a skylight over his area, which impeded the passage of the light and air to the plaintiff's parlour window; and it was held, that as the license had been acted upon and executed, and expense had been incurred by the defendant in the construction of the skylight, that the license could not be recalled by the plaintiff, and the defendant treated as a wrong-doer, at all events, until the plaintiff had offered to put the defendant into the same situation as he was before the granting of the license by reimbursing him his expenses.

So, in the case of *Liggins v. Inge*, (i) it appeared that the plaintiff having a right to the use of a stream of running water which flowed through the land of the defendant, had given the defendant a parol license to lower the banks of the river, and erect a weir, and divert a portion of the water which had previously flowed to the plaintiff's mill; and it was held, that the plaintiff, after he had so given up his right to the water that had been diverted, and suffered the grantee of the license to act upon the faith of such relinquishment, and to incur expense in doing the very act to which his consent was given, it was then too late for him to retract such consent, or to throw on the grantee of the license the burthen of restoring matters to their former state and condition. The banks that were cut down, and the ground whereon the weir was erected, were the soil and property of the defendant, the acts complained of, consequently, were in this, as in the previous case, done upon *the land of the licensee*, and the license, consequently, had not the effect of giving to him any interest in or right over the *soil and freehold of another*. There may, consequently, be a waiver and extinguishment of an *existing easement* by parol, but the creation of an easement *de novo*, can only be effected through the medium of a DEED.

A distinction has been sought to be drawn in some cases between a license to be exercised for a term of years, and a license to do a thing for an indefinite period, amounting in point of law to a grant of a freehold interest in the nature of an easement; and it has been contended that a right of an incorporeal nature may be granted to be exercised for a term of years on the authority of the cases of *Webb v. Paternoster*, (k) where

(A) 8 East, 309.

(i) 5 M. & P. 712.

(k) Palm. 71. Pop. 151. 2 Roll. R. 143, 152.

"It is by no means certain," observes Alderson,

B., that the license in the case of *Webb v. Paternoster* was not a *license under seal*." Jurist ut sup. 189.

the licensee claimed a right to keep a cock of hay upon the land for a limited period; and of *Wood v. Lake*, (l) where he claimed a right to the exclusive use of the land for the term of seven years for stacking coals; but these cases are not authorities for any such position. In the case of *Taylor v. Waters*, (m) indeed, it was holden that a parol license to enter the Italian Opera House during the performance for twenty-one years, through the medium of a silver ticket, which had been granted for a valuable consideration, could not be revoked; but the objection was not taken that the right claimed was an incorporeal right, which lay in *grant*, and could not therefore pass without deed; and this case, which is entirely at variance with numerous ancient authorities, (n) has recently been expressly overruled.

Thus, where Lord Eglintoun being possessed of a close of land, upon which was erected a stand which overlooked a race-course, authorized the issue of tickets for the admission of strangers to the stand *during the races*, one of which tickets was purchased by the plaintiff for a valuable consideration, it was held that Lord Eglintoun had a right, without offering to return the money paid, to revoke the license, and order the plaintiff to quit the stand, and on his refusal, to remove him by force. (o)

Executory donations and gifts.

All *executory* donations and gifts to be good and binding must, as previously mentioned, be made by DEED. If the gift has not been perfected and consummated by an actual transfer and delivery of the thing given or granted to the donee, it is a *nudum pactum*, a mere promise to make the gift, binding doubtless *in foro conscientiae*, but it cannot be enforced by compulsion of law; but if the gift be made by deed, the donee at once becomes the legal owner, although there may have been no transmutation of possession, and the thing granted may not have passed out of the hands of the donor. But there must, of course, be nothing fraudulent and illegal, in the transaction, and the gift must not contravene the rules of law framed for the protection of creditors and purchasers. (p)

A gift by deed of goods and chattels, unaccompanied by a transfer of *possession*, and a visible change of ownership, when made by a person in *insolvent* circumstances, is fraudulent and void; and is never permitted to interfere with the claims of creditors and *bonâ fide* purchasers.

(l) Sayer, 3.

(m) 7 Taunt. 384.

(n) Bro. Abr. Licenses, pl. 15, 14; Vin. Abr. Grant. G. (a); 2 Rolle Abr. 63; Grant. G. Co. List. 86.

(o) *Wood v. Ledbitter*. Jurist, March 8th, 1846, p. 189; 13 M. & W. 838.

(p) Lord Tenterden, C. J., 2 B. & Ald. 552. *Doe dem Roberts v. Roberts*, 2 B. & Ald. 367. *Robinson v. M'Donnell*, ib. 134.

*Grants, partitions, exchanges, leases, assignments, and surrenders
of realty.*

No partition, exchange, lease, surrender, or assignment of any freehold or leasehold land made between the 31st December, 1844, and the 1st of October, 1845, is valid at law unless the same has been made by deed, but any agreement to let or surrender any such land will take effect as an agreement to execute a lease or surrender, and the person who is in possession of the land in pursuance of any agreement to let, may from payment of rent and other circumstances be construed to be a tenant from year to year.^(g) By 8 & 9 Vict. c. 106, it is enacted that after the 1st of October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery, also that a feoffment (other than a feoffment made under a custom by an infant) shall be void, unless evidenced by deed, and that a partition, and an exchange of any tenements or hereditaments, not being copyhold, and a lease *required by law to be in writing*, (post 91) of any tenements or hereditaments, and an assignment of a chattel interest, (not being copyhold) in any tenements or hereditaments, and a surrender in writing of an interest in any tenements or hereditaments not being a copyhold interest, and not being an interest which might by law have been created without writing, (post 91) made after the 1st of October, 1845, shall also be void at law unless made by deed. It is enacted also (s. 6.) that after the 1st of October, 1845, contingent, executory, and future interests and possibilities coupled with an interest, and rights of entry, whether immediate or future, and whether vested or contingent may be disposed of by deed. An agreement void as to *the duration of a lease*, may regulate the terms upon which the tenancy subsists in other respects.^(r)

(g) 7 & 8 Vict. c. 76; 8 & 9 Vict. c. 106. *Richardson v. Giffard*, 1 Ad. & E. 52, s. c.; 3
(r) *Doe d. Rigge v. Bell*, 5 T. R. 472. N. & M. 325, s. c.

SECTION II.

AUTHENTICATION BY WRITING SIGNED BY THE PARTY MAKING THE CONTRACT.

Leases.

It has been mentioned at the close of the last section, that the transfer of property act requiring all leases, for a longer duration than the ordinary tenancy from year to year, to be created by deed, does not extend "to any act or thing, executed or done before the first day of January, 1845." All leases, therefore, made and executed prior to that period, continue to be governed by the salutary provisions of the Statute of Frauds, whereby it is enacted that "*all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seizin only, or by parol, and not put into writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing*, shall have the force and effect of leases, or estates at will only, except all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two-third parts at the least of the full improved value of the thing demised," and that "no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of, any messuages, manors, lands, tenements or hereditaments, shall be assigned, granted or surrendered, unless it be by DEED, or *note in writing signed by the party*, so assigning, granting, or surrendering the same, or their agents thereunto lawfully *authorized by writing*, or by act and operation of law. (a)

Contracts for an interest in land.

By the fourth section of the Statute of Frauds, it is also further enacted, "that no action shall be brought upon any contract or sale of *lands, tenements, or hereditaments*, or any interest in, or concerning them, unless the *agreement* upon which such action shall be brought, or some memo-

(a) *Mollett v. Brayne*, 2 Camp. 103. *Boothby v. Martin*, 1 Camp. 318.

randum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

An *interest in land* within the statute is such an interest as conveys a right to an estate in reversion, or a right to the present possession of the land.

A contract for the sale of growing grass, (*prima vestura*.) to be mown and made into hay on the land by the vendee, is a contract for the sale of an interest in land within the statute, inasmuch as it confers upon the vendee a right to the possession of the soil, from the date of the contract until the period when the grass should be cut and dried. (*b*) *Grass* is the natural growth and produce of the land itself, permanently remaining, not exhausted when once cut, but constantly growing and renewing. It cannot be seized in execution under a *fieri facias* as goods and chattels, and upon the death of the owner of the land, it goes to his heir-at-law, and not to his executors or personal representative. (*c*)

A contract for the purchase and sale of growing timber or underwood, not made with a view to its immediate severance and removal from the soil, has likewise been held to be a contract for an *interest in land*, as it confers upon the vendee a right to the casual profits of the trees, together with a right to the soil for the trees to grow in. (*d*) But when standing timber was sold at so much a foot, with a view to its immediate severance from the soil and delivery as a chattel to the vendee, it was held that this was not a contract for the sale of an interest in land, but for the sale of goods and chattels, "the produce of the trees when they should be cut down and severed from the freehold." (*e*)

An agreement for the sale and purchase of growing fruit and of hops, is an agreement for the sale of an interest in land, as they are not distinguishable from the land itself in legal contemplation until actual severance, and pass to the heir, and not the executor; (*f*) but *fructus industriales*, such as growing crops of turnips, potatoes, and corn, and the annual productions of the soil raised by the labour of man, which are seizable by the sheriff under a *fi. fa.*, and pass to the executor and not to the heir, are considered goods and chattels, and contracts for the sale of them are, from

(*b*) *Crosby v. Wadsworth*, 6 East, 610. *Griffiths v. Puleston*, 14 Law J. Rep. n. s., Excheq. 33.

(*c*) *Bayley, J., Evans v. Roberts*, 8 D. & R. 615; 5 B. & C. 832.

(*d*) *Scorell v. Boxall*, 1 Y. & J. 398. *Sugd. Vend.* ch. 3, sec. 2.

(*e*) *Smith v. Surman*, 9 B. & C. 568. "From the nature of this contract it must be taken to be the same as if the parties had contracted for timber already felled." Lord Abinger, C. B.; 9 M. & W. 505.

(*f*) *Rodwell v. Phillips*, 9 M. & W. 504. *Chambre, J., Waddington v. Bristow*, 2 B. & P. 455.

this their original nature, considered to be contracts for the sale of goods and chattels, and not of an interest in land, although they are to remain in the soil, and derive a nutriment therefrom, until they have arrived at maturity; and the mere license to come upon the land for the purpose of gathering and securing the crop which is incident to such a contract, is not a sale of a right concerning land within the meaning of the statute. (g)

"*Fixtures*, although annexed to the freehold, may be treated for some purposes as chattels: in the execution of a *fi. fa.* they may be seized and sold as falling under the description of goods and chattels, in like manner as growing crops of corn, or other *fructus industriales*, which go to the executor; (h) and it has been held, consequently, that a contract for the sale of fixtures is not a contract for the sale of an interest in land; neither is it a contract for the sale of goods and chattels within the meaning of the statute. (i)

Railway shares.—A contract for the purchase and sale of railway shares, does not come within the operation of the Statute of Frauds, "since they are neither an interest in land, nor are they goods and merchandizes (k) within the meaning of the act. The transfer of property of this description is regulated by the various railway acts, and is generally required to be made by DEED.

Furnished lodgings.—A contract by one person to let, and another to take a house, or furnished lodgings in a house, is a contract for an interest in land within the fourth section of the statute. Thus, where the defendant orally agreed to take apartments in the plaintiff's dwelling-house, to be entered upon at Christmas, at an annual rent to be paid quarterly, and the defendant, the day before he was to have taken possession, announced his determination to recede from the bargain, it was held that no action was maintainable against him, as the contract was a contract for an interest in land within the meaning of the fourth section of the act. (l)

All agreements for leases consequently, or for grants of any estate or interest in land to be made or created at any future period, must be expressed by some note or memorandum in writing, signed by the party to be charged therewith.

An oral agreement was entered into between the plaintiff and the

(g) *Parker v. Stanlands*, 11 East, 362. *Warwick v. Bruce*, 2 M. & S. 208. *Mayfield v. Wadsley*, 3 B. & C. 857; 5 D. & R. 224, s. c. *Evans v. Roberts*, 8 D. & R. 614; 5 B. & C. 829, s. c. *Watts v. Friend*, 10 B. & C. 446. *Sainsbury v. Matthews*, 4 M. & W. 347. *Jones v. Flint*, 10 Ad. & E. 753; 2 P. & D. 594, s. c.

(h) Parke, B., 1 C. M. & R. 275.

(i) *Hallen v. Runder*, ib. 266; 3 Tyr. 959, s. c. *Lee v. Risdon*, 7 Taunt. 191. Parke, J., 2 Sc. 249. *Pinner v. Arnold*, 1 Tyr. & G. 4.

(k) Parke, B., 6 M. & W. 214. *Humble v. Mitchell*, 11 Ad. & E. 205. *Bradley v. Holdsworth*, 3 M. & W. 422.

(l) *Inman v. Stamp*, 1 Stark. N. P. C. 12. *Edge v. Stafford*, 1 C. & J. 391.

defendant for a lease of a ready-furnished house at a certain specified rent, and the house being only partially furnished at the time of the making of the contract, the defendant promised to send in more furniture, and the plaintiff, relying upon this promise, took possession of the house, and occupied it for several months; and the furniture not being put in, he brought his action against the defendant, to recover damages for the breach of the defendant's promise in that behalf; but it was held that the promise formed part of an entire contract for an interest "in or concerning lands, tenements, and hereditaments, and ought consequently to have been expressed in writing." (m)

The plaintiff being possessed of a messuage and premises for the residue of a term of years, agreed to give up possession to the defendant, and suffer him to become tenant thereof for the residue of the term, in consideration of the defendant's undertaking to do certain repairs to the said messuage and premises; the defendant, in pursuance of the said agreement, entered into possession, and became tenant for the residue of the term, but neglected to fulfil his promise to repair the house; and it was held, that this was an agreement relating to an interest in land within the meaning of the statute. "Perhaps, if the declaration had stated an agreement to relinquish the possession merely, it might not have amounted to a contract for an interest in land: but it goes on to allege that the plaintiff was to suffer the defendant to become tenant thereof for the residue of the term. Now he could not become such tenant except by an assignment, and that would be a contract for an interest in land within the statute, and ought to be reduced into writing." (n)

Executed contracts.—The statute of course only applies to executory contracts for the use and occupation of land and realty, and the sale of the produce of the soil. If the contract has been executed in the one case by an actual entry upon the land, and an *occupation* thereof, or in the other by the actual severance and removal by the purchaser of the produce of the soil, an action is of course maintainable for use and occupation on the one hand, and for goods sold and delivered on the other, whether the original contract was or was not in writing. Parties have consequently often recovered upon an executed agreement, although they never could have prevailed upon the contract if it had been resisted and contested whilst it remained executory. (o)

(m) *Mechelen v. Wallace*, 7 Ad. & E. 49; 2 N. & P. 224, n. c. The sending in of the furniture was held, however, to be a condition precedent to the defendant's right of action for the rent agreed upon. 7 Ad. & E. 54, n. (b.)

(n) *Buttenore v. Hayes*, 5 M. & W. 456. Parke, B., 459.

(o) *Teal v. Auty*, 2 B. & B. 100. *Griffith v. Young*, 12 East, 513, 515. *Mavor v. Pyne*, 11 Moore, 2.

A tenant in the actual occupation of a house under an existing demise, agreed to pay to the landlord, in consideration that the latter would put another story upon the house, 10*l.* per cent. per annum upon the cost of the erection, in addition to the rent; and the story having been built, the landlord brought his action upon the contract for the increased payment, and it was held that the action was not barred by the statute. (*p*)

Guarantees and executory promises and contracts generally.

By the fourth section of the Statute of Frauds, it is further enacted, "that no action shall be brought whereby to charge any *executor or administrator* upon any *special promise to answer damages out of his own estate*; or whereby to charge the defendant upon any *special promise to answer for the debt, default, or miscarriage of another person*, or to charge any person upon any *agreement made in consideration of marriage*, or upon any *agreement that is not to be performed within the space of one year from the making thereof*, unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be *in writing*, and *signed by the party to be charged therewith*, or some other person by him lawfully authorized."

The act of 9 *Geo.* 4, c. 14, further requires all acknowledgments and promises which operate to take a claim or cause of action out of the operation of the Statute of Limitations; and all promises made after full age to pay debts contracted during infancy, and all ratifications by adults of promises or simple contracts made during their minority, (*q*) and all representations concerning the character, credit, or conduct of third persons, to enable them to obtain credit, or money, or goods, (*r*) to be put into writing and signed by the party to be charged therewith. And in the case of annuities and transfers, and the sale or assignment of a copyright, certain written evidence and forms of registry are required by statutory enactment to give effect to the transaction. (*s*)

Agreements in consideration of marriage.

The clause in the fourth section of the Statute of Frauds, relating to agreements in consideration of marriage, does not extend to the marriage contract itself, *promises of marriage* consequently are binding, though

(*p*) *Hoby v. Roebuck*, 7 Taunt. 157; 2 Marsh. 433, s. c.

(*q*) *Hartley v. Wharton*, 11 Ad. & E. 934. See post, § 2, p.

(*r*) *Lyde v. Barnard*, 1 M. & W. 101; 1

Tyr. & G. 250, s. c. *Swann v. Phillips*, 8 Ad. & E. 457.

(*s*) 53 *Geo.* 3, c. 141; 6 *Geo.* 4, c. 110. *Power v. Walker*, 3 M. & S. 7; 5 & 6 Vict. c. 46.

not reduced into writing and signed by the party sought to be charged thereon. (t) But all promises and agreements made by one person in consideration of the completion of a marriage by another, are within the statute, and must be reduced into writing, whether they are executory or executed; the performance of the contract does not take the contract out of the operation of the statute, as the words of the act would be rendered nugatory by such a result. A letter written by a father, signifying his assent to the marriage of his daughter with J. S., and that he would give her a marriage portion of 500*l.*, was held a sufficient promise in writing within the meaning of the statute. (n)

Agreements not to be performed within a year.

The clause in the Statute of Frauds respecting any agreement that is not to be performed within the space of one year from the making thereof, extends to all contracts which are not by the terms of them to be fully and completely executed within a year. A part performance of the contract will not, consequently, take it out of the provisions of the statute. Thus, where a person had become a subscriber to the "Boydell Shakspeare," a work which was published in numbers, and could not, and was not intended to be completed within a year, and had taken and paid for several numbers as they came out, and then refused to continue his subscription and complete the set, it was holden that an action could not be maintained against him for the money, as there was no written contract signed by him according to the statute. "It has been argued," observes Lord Ellenborough, "that an incheate performance within a year is sufficient to take the case out of the statute; but the word used in the clause of the statute is *performed*, which, *ex vi termini*, must mean the *complete* performance or consummation of the work." "And I cannot say," observes Bailey, J., "that a contract is *performed* when a great part of it is to remain unperformed within the year; or, in other words, that *part performance* is *performance*. The mischief meant to be prevented by the statute was the leaving to memory the terms of a contract for a longer time than a year. The persons might die who were to prove it; or they might lose their faithful recollection of the terms of it. If part performance were to supply the want of writing, a party might be fixed with a contract for supplying goods for twenty years together, at the price which was paid for them the

(t) *Cock v. Baker*, 1 Str. 34. *Harrison v.* 236. *Bird v. Blossie*, 2 Vent. 361. *Moore v. Cage*, 1 Raym. 386. *Hart*, 1 Vern. 110; Bac. Abr. Agreements, (c) 8.
(n) *Countess of Montague v. Maxwell*, 1 Str.

first year," without any evidence in writing of the bargain, which would be contrary to the spirit and intention of the act. (x)

A contract whereby a coachmaker agrees to let a carriage for a term of five years, in consideration of an annual payment for the use of it, but which, by the custom of trade, is determinable at any time within that period, on payment of a year's hire, is an agreement not to be performed within a year, within the meaning of the statute. (y) So also is a contract for a year's service, to commence on a day subsequent to the making of the contract, for a contract which extends one minute beyond the time pointed out by the statute, falls within its prohibition. Where, therefore, an action had been brought upon a verbal contract made on the 27th of May, whereby the plaintiff had agreed to take the defendant into his service for a year, to commence on the 30th of June following, and the defendant had tendered himself as servant to the plaintiff on the day appointed, but the latter had refused to receive him, it was held that the action was prohibited by the statute, as the contract was not to be performed within a year from the time when it was made. (z) So, where the contract was made on the 20th of July to serve from the 24th for a year, and the servant, after serving a few months, was dismissed at a month's warning, and brought an action for his wages for the remainder of the year, it was held that the action could not be maintained, as the contract was within the fourth section of the statute. (a)

But a contract, or general hiring for one year from the time of the making of the contract, and so on from year to year so long as the parties shall respectively please, has been held not to extend beyond the time limited by the statute, and is not consequently within the provisions of the fourth section. (b)

The statute does not extend to contracts which are to be performed upon the happening of some uncertain event, and which *may* not consequently be completed within a year. (c) An agreement consequently to pay the plaintiff so many guineas on the day of his marriage, was held not within the statute, although the marriage did not take effect for nine years, for it might have happened within the year. (d) And where an oral promise was made to pay so much money on the return of a ship, which ship happened not to return within two years after the time of the making

(x) *Boydell v. Drummond*, 11 East, 154, 158.
Sweet v. Lee, 4 Sc. N. R. 90.

(y) *Birch v. The Earl of Liverpool*, 9 B. & C. 392.

(z) *Bracegirdle v. Heald*, 1 B. & Ald. 722.

(a) *Snelling v. Ld. Huntingfield*, 1 C. M. & R. 25; 4 Tyr. 606, s. c.

(b) *Beeston v. Collyer*, 12 Moore, 552; 4 Bing. 309, s. c. *Sykes v. Dixon*, 9 Ad. & E. 693.

(c) *Wells v. Horton*, 12 Moore, 176; 4 Bing. 40, s. c.

(d) *Peter v. Compton*, Skin. 358; Holt, 326, s. c. *Smith v. Westall*, 1 Raym. 816.

of the promise, it was held that the promise was not within the statute, for that, by possibility, the ship might have returned within the year, though by accident it happened that it did not, and that the clause in the statute only extended to such promises and agreements as were, by the express appointment of the parties, not to be performed within a year from the time of the making thereof. (e) And it has been laid down, that "where the agreement is to be performed upon a *contingency*, and it does not appear, within the agreement, that it is to be performed after a year, there a note in writing is not necessary, for the contingent and uncertain event *might* happen within the year; but where it appears, by the whole tenor of the agreement, that it is to be performed *after* the year, there a note is necessary, otherwise *not*." (f)

Contracts executed within the year.—Neither does the statute apply where the contract is wholly executed, or intended to be so, by one of the parties thereto, within the year, although there are some acts to be done by the other party beyond the prescribed limit. Thus, where a landlord agreed to lay out 50*l.* in improvements upon the demised premises, and the tenant agreed to pay 5*l.* per annum for the remainder of his term, of which several years were then unexpired, in addition to the reserved rent, and the 50*l.* was expended within the year, and the landlord afterwards brought his action for the arrears of the 5*l.*, it was held that he was entitled to recover, though the agreement had not been put into writing and signed. "As to the contract not being to be performed within a year," observes Littledale, J., "we think that as the contract was entirely executed on one side within the year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the Statute of Frauds does not extend to such a case. In the case of a parol sale of goods, it often happens that they are not to be paid for in full till after the expiration of a longer period of time than a year; and surely the law would not sanction a defence on that ground, when the buyer had had the full benefit of the goods." (g)

Promises to answer for the DEFAULT or MISCARRIAGE of another.

The clause in the statute as to charging the defendant upon any special promise to answer for the default or miscarriage of another person, applies to the *tortious* default or miscarriage of another, as well as for his breach of contract: therefore, where the plaintiff in his declaration alleged that

(e) Anon. Salk, 280. *Fenton v. Emblers*, 3 Burr. 1282; 1 W. Bl. 853, s. c.

Horton, 12 Moore, 182, 183; 4 Bing. 43, 44.

(f) *Peter v. Compton*, Skin. 353. *Wells v.*

(g) *Donellan v. Read*, 3 B. & Ad. 906. *Mavor v. Pyne*, 11 Moore, 2.

the defendant, in consideration that the plaintiff, at the request of the defendant, would let a certain gelding of his out to hire to one Joseph English, to ride to Reading, he, the defendant, undertook and promised the plaintiff, that the said Joseph English should redeliver it safe to the plaintiff, it was held that this was a promise to answer for the default of another, within the statute, and ought accordingly to have been expressed in writing. (*h*) So, where one T. E. Marter had, without the leave or license of the plaintiff, wrongfully ridden a horse of the plaintiff, in consequence whereof the horse died; and the defendant, in consideration that the plaintiff would not bring an action in respect thereof against the said T. E. Marter, promised to pay the plaintiff a sum of money, to be determined on by a third party, by way of satisfaction to the plaintiff for the damage he had sustained, &c., it was held that this was an undertaking for the default or miscarriage of another within the statute, and ought consequently to have been expressed in writing. (*i*)

So, where the defendant, in consideration that the plaintiff, at the request of the defendant, would become bail and surety for one Hadley, he, the defendant, would save harmless and indemnify the plaintiff from all payments, damages, costs, and expenses which he might incur, or be put to, by reason thereof, it was held that this was a promise to answer for the default of another within the fourth section of the statute. (*k*) But a promise by one parishioner to indemnify another against the consequences of resisting a claim of tithe, is not a promise to be responsible for the default of another, but a promise to pay what the promisee may lose by defending the promisor's interests in a suit. (*l*)

Promises to answer for the DEBT or DEFAULT of another.

If A, in consideration that B will *stay proceedings* in an action he has commenced against C, to recover a sum of money due to him from C, promises to pay that money, such promise is a promise to answer for the *debt* of another, within the fourth section of the statute. (*m*)

A distinction was formerly taken between a promise to pay for goods supplied to a third party, made *before* and *after* the delivery of such goods. The former was held to be an original undertaking, and so not within the statute, and the latter a collateral undertaking within the statute, but this distinction has been decisively overruled; and it is now

(A) *Buckmyr v. Darnall*, Raym. 1085; Salk. 28 & b.; Mod. 249, s. c.

(i) *Kirkham v. Marter*, 2 B. & Ald. 613.

(k) *Green v. Creswell*, 10 Ad. & E. 453; 2

P. & D. 430, s. c.

(l) *Ib.* p. 459. *Adams v. Dansay*, 6 Bing. 506; 4 M. & P. 245, s. c.

(m) *Fisk v. Hutchinson*, 2 Wils. 94.

holden, that if the person for whose use the goods have been furnished, is *liable at all*, any promise by a third person to pay for them, is a promise to answer for the debt of another, and must be authenticated by writing pursuant to the statute.

The operation of the statute, therefore, is not confined to collateral undertakings to be answerable for a *subsisting* debt or duty; it extends to undertakings made *before* the debt accrues or the duty arises, and a guarantee, consequently, which a tradesman, *before* he sends out goods on credit, requires from a third party, because he does not like to trust the person for whose use the goods are intended, is within the statute, if *the latter has been treated by the tradesman as his DEBTOR.* (n) Thus, where the plaintiff, a tradesman, being asked by the defendant to serve one Coulthard of Pontefract, with groceries, replied that he did not know him, and did not like to trust him, and the defendant said, "If you do not know him, you know me, and I will see you paid;" and an order was afterwards received by the plaintiffs from Coulthard for groceries, which were sent accordingly, and the plaintiffs made *Coulthard* their debtor for these goods in their books, and applied to him for payment, but were refused, whereupon they brought their action against the defendant upon his undertaking; it was holden, that this was a promise to answer for the *debt* of another, within the meaning of the provisions of the statute of frauds. (o) So, where the plaintiff, having commenced certain business for one *Fox*, refused to go on with it, without a promise by the defendant to pay the further expenses to be incurred, it was holden that this promise was within the statute. (p)

But the sale may be to one man, although the goods are to be delivered to another, and a person may promise to pay for goods supplied to, or for work done at his request, or by his directions for a third party, as the real debtor, and not in the character of a surety, and if he has been treated by the person who has furnished the goods, and done the work, as the party liable, and credit has been given to him, his promise or undertaking to pay is not a collateral promise to answer for the debt of another, and the statute consequently is out of the case.

"If two come to a shop, and one buys, and the other to gain him credit, promises the seller 'if *he* does not pay you, *I* will,' this is a collateral undertaking, void without writing by the statute. But if he says, 'let him have the goods, I will be your paymaster,' or 'I will see you

(n) *Peckham v. Faria*, 3 Doug. 13. *Parsons v. Waller*, ib. 14, n. (c). *Matson v. Wharam*, 2 T. R. 80.

(o) *Matson v. Wharam*, 2 T. R. 80.
(p) *Barber v. Fox*, 1 Stark. 270.

paid,' this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant." The sale in the last case is to *the undertaker only*, though the delivery be to *another* by his appointment. (q) But in order to determine whether the party giving the undertaking or making the promise of payment is primarily or collaterally liable, the surrounding circumstances and the situation of the parties must be regarded, as well as the exact expressions used. (r) If the plaintiff has made the party to whom the goods have been furnished his debtor, as previously mentioned, if he describes him as such in his books or in letters, he can only treat the other as a surety. (s) "I always," observes Holt, C. J., "require the tradesman to produce his books to see to whom *credit has been given*."

Mr. Simpson introduced his friend Penton to an upholsterer and asked the latter, in Penton's presence, if he had any objection to supply Penton with some furniture, and, that if he would, he (Simpson) would be answerable for it; the upholsterer asked *Simpson*, what length of credit *he (Simpson)* required, and Simpson said that he would see the furniture paid for, at the end of six months, and that he thought 40*l.* or 50*l.* worth would be wanted. The upholsterer took the order and forwarded 46*l.* worth of goods to Penton, and at the end of six months he sent in his account to Simpson. The account in the upholsterer's cash book and ledger was headed, "Mr. Penton, per Mr. *Simpson*," and it was contended that as the goods were ordered by Penton, that *Simpson* was only collaterally liable as a surety, after default in payment by Penton, but the jury found that the credit was given to *Simpson*, and that he was the real purchaser; and it was held, that they were perfectly justified in so doing. (t)

"I think," observes Bayley, B., "that the expression, 'I'll be answerable,' or 'I'll see you paid,' are equivocal expressions, and then we ought to look at the surrounding circumstances to see what the contract really was. In the case of *Oldham v. Allen*, the Court of King's Bench said that a contract might be collateral or not according to circumstances, there the defendant had sent the plaintiff, who was a farrier, to attend some horses, and said to him, 'I will see you paid;' the farrier knew the parties who were owners of some of the horses, and made them debtors in his books, but debited the defendant for the others whose owners he did not know, the court held, that the promise was original in respect of

(q) *Birkmyr v. Darnell*, 1 Salk. 27; 6 Mod. 250, a. c. *Watkins v. Perkins*, Raym. 224.

(r) *Keate v. Temple*, 1 B. & P. 158.

(s) *Austen v. Baker*, 12 Mod. 250. *Darnell*

v. Pratt, 2 C. & P. 82. *Anderson v. Hayman*, 1 H. Bl. 121. *Rains v. Storry*, 3 C. & P. 130.

Mines v. Sculthorpe, 2 Campb. 215.

(t) *Simpson v. Penton*, 2 C. & M. 430.

those owners whose names he did not know ; but in respect of the others that it was collateral." (u)

One Brunton, the lessee of a theatre, applied to the plaintiff, to fit up the theatre with a gas apparatus, and the plaintiff, after the work was commenced, becoming doubtful of Brunton's ability to pay the expense thereof, refused to go on with it until he had the guarantee of some responsible person, whereupon the defendant gave to the plaintiff the following written undertaking, "Royal West London Theatre, Sept. 9th, 1822.—I hereby undertake to Mr. Thomas Edge, (the plaintiff) *to see him paid* for the gas apparatus *he has put up and furnished for Mr. John Brunton*, according to the work *to be performed* in a scientific manner, as shall be thought necessary and approved by Mr. Evans the superintendant of the gas works in Peter Street." And the plaintiff then proceeded with the work and completed it, and brought an action against the defendant, and obtained a verdict for the price of the apparatus ; and it was held, that the defendant might be made chargeable upon his undertaking as the primary and sole debtor. (x) So, where the defendant had given a written undertaking for the payment of gas furnished to a theatre in the following terms, "I, the undersigned, do hereby engage to pay the directors of the Manchester gas works, for all the gas which may be consumed in the minor theatre, and by the lamps outside the theatre, during the time that *it is occupied by my brother-in-law, Mr. Neville ;*" it was held, that the defendant might be made liable as the primary and sole debtor in an action for goods sold and delivered. (y)

A carpenter, having undertaken to complete the carpenter's work in a house of the defendant's, and to find all the materials necessary for the purpose, proved to be unable to find funds for the purchase of a sufficient quantity of timber, whereupon the carpenter applied to the plaintiff, who was a timber-merchant, for a supply of timber upon credit, and the plaintiff furnished the timber upon the faith of the following written undertaking, signed by the defendant: "I, *Richard Hatfield*, (the defendant,) do agree to pay to *Mr. J. Moore*, (the plaintiff,) 50*l.* for timber to the house in Annett's Crescent, *out of the money that I have to pay to William West*, (the carpenter,) provided West's work is completed." And it was held, that this was not a collateral undertaking to pay the debt of West, but an original independent contract and promise, not within either the words or the spirit of the statute of frauds. (z)

(u) Bayley, B., ib. 433, 434. *Langdale v. Parry*, 2 D. & R. 337, 340.

(x) *Edge v. Frost*, 4 D. & R. 245.

(y) *Wood v. Benson*, 2 C. & J. 94.

(z) *Dixon v. Hatfield*, 10 Moore, 42 ; 2 Bing. 439, s. c.

So, where the plaintiff, in his declaration, alleged that one Joshua Hill was employed by J. L. Hesse, to do work for him on certain houses, and the defendant was employed by Hesse as surveyor over Hill in respect of the said work, and that the defendant, in consideration that the plaintiff, at the request of the defendant, would provide Hill with materials for the work, promised the plaintiff to pay him a reasonable sum for such materials, out of such monies received by him, as should become due to Hill, in respect of the said work, if Hill should give him an order for that purpose; and then averred that Hill gave the order, and afterwards required certain materials, and that the plaintiff provided and delivered to Hill materials of the value of 1,000*l.*, and that 1,500*l.* became due to Hill for the work, and had been received by the defendants, and that the plaintiff thereupon requested the defendants to pay him for the materials out of such monies so due to Hill, and so received by the defendant, which the defendant had refused to do, it was held, that this was not a promise to answer for the debt on default of another, within the meaning of the statute of frauds. (a)

If the defendant, upon the face of a written undertaking, makes himself liable only as a surety in default of payment by the party to whom the goods are actually furnished, the plaintiff will, of course, be nonsuited, if he sues him upon an original contract as the actual debtor.

Whether an undertaking for the payment of goods furnished to a third party is the contract simply of a surety, coming in aid only of a principal debtor, and who is to be liable only secondarily, and after the default of such principal, or whether he is himself primarily liable as the actual debtor, no contract having been entered into with the other party, and no liability whatever attaching to him, is sometimes a question of intention of the greatest nicety.

If goods are furnished to an infant at the request of the defendant, the defendant's undertaking or promise to pay for them, is not a collateral promise to answer for the debt of another, inasmuch as the infant is not liable to pay for them, and cannot be indebted by reason of his minority. (b)

And if the original debt be discharged and extinguished by the substitution in lieu thereof of a new contract to pay the amount of that debt, such new contract is not a collateral promise to answer for the debt or default of another. (c)

(a) *Andrews v. Smith*, 2 C. M. & R. 627. *Sweeting v. Asplin*, 7 M. & W. 173.

(b) *Harris v. Hunibach*, 1 Bur. 373. *Dun-*

combe v. Tickridge, Aleyn, 94; 1 Wms. Saund. 211, d.

(c) See post. ch. 11, sec. 2, "Change of inter-

A debtor being taken in execution by his creditor, the plaintiff, on a writ of *ca sa*, the defendant, in consideration that the plaintiff, at the request of the defendant, would discharge his debtor out of custody, promised the plaintiff that he the defendant would pay to the plaintiff the costs and damages, for which such debtor had been taken in execution; and it was held, that this was a promise not within the statute, because the debt was extinguished by the discharge of the debtor who was no longer liable. (d)

So, where the plaintiff had issued execution against one Lloyd, and afterwards, with the assent of all the parties interested, Lloyd conveyed all his property to the defendant, he undertaking to satisfy Lloyd's creditors; and, thereupon, it was agreed between the plaintiff Lloyd and the defendant, that the plaintiff should relinquish execution against Lloyd, (which he did,) and should look to the defendant as his debtor instead of Lloyd; it was held, that the defendant's undertaking to pay the plaintiff, was not a promise to answer for the debt of a third person, within the statute; for that Lloyd was discharged from the debt, and would have had a good answer by plea, if the plaintiff had sued him, or by *audita querelâ*, if the plaintiff had issued execution. (e)

And where a purchaser of goods, being unable to pay for them, transferred and delivered them to the defendant, and the latter promised the vendor to pay for them; it was held, that this was a substitution of a new contract of sale, and a new purchaser in lieu of the original contract of sale, that the original purchaser was discharged from all liability in respect of the goods, and his debt being extinguished, the promise was not a promise to be answerable for the debt of another. (f)

And a contract or promise, although made *concerning* the debt or default of a third party, may yet be an original contract not within the statute.

If the plaintiff, for example, has a lien upon the goods and chattels of his debtor in his possession, or if he holds securities for the payment of his debt, and is induced either to give up his lien upon the goods or to part with his securities upon the faith of a promise, made by the defendant, to pay the amount of the plaintiff's claim thereon, the promise so made is not within the mischief intended to be provided against by the statute

est by novation and substitution." *Hodgson v. Anderson*, 5 D. & R. 746, 747; 3 B. & C. 855, 866, s. c. *Lacy v. M'Neile*, 4 D. & R. 7. *Taylor v. Hilary*, 1 C. M. & L. 743; 3 Dowl. 461, s. c.

(d) *Goodman v. Chase*, 1 B. & Ald. 297.

Butcher v. Stewart, 11 M. & W. 857. 12 Law, J., rep. N. S. 391, s. c. *Lane v. Burghart*, 1 Ad. & E. N. S. 937.

(e) *Bird v. Gammon*, 5 Sc. 213; 3 Bing. N. C. 883, s. c.

(f) *Browning v. Stallard*, 5 Taunt. 450.

of frauds, although the amount promised to be paid, as the consideration or inducement for the abandonment of the lien or the surrender of the securities, may be the subsisting debt of a third party, due to the plaintiff, and the performance of the promise may have the effect of discharging that debt. (g)

Thus, where the plaintiff, in his declaration, alleged that "the defendant, in consideration that the plaintiff, at the request of the defendant, would relinquish the possession of certain goods, which had before then been granted and sold to him by Abbott, by a bill of sale, made in consideration of 122*l.* 1*9s.* 6*d.*, due from Abbott to the plaintiff, and which goods he was about to sell in satisfaction of his debt, the defendant undertook to pay him 177*l.* 1*9s.* 6*d.* in April then next; it was held, that this was not a promise to pay the debt of another.

"What is this," observes Mansfield, C. J., "but the case of a man, who, having the absolute uncontrolled power of selling goods, refrains, upon the request of another. This is not a promise to pay the debt of another within the meaning of the act. (h)

So, where the plaintiff, holding securities for the payment of a debt due to him, had parted with those securities, and given up his lien upon them, upon the faith of a promise by the defendant, to pay and satisfy the amount of the plaintiff's claim upon them; it was held, that this promise was not a promise to be answerable for the debt of another within the true intent and meaning, and the spirit of the provisions, of the statute of frauds, but an original independent contract, amounting to a purchase of the securities, or of the defendant's interest therein. (i)

And, where the plaintiff had distrained upon his tenant for rent in arrear, and afterwards delivered up the goods and chattels to the defendants, for the use of the tenant upon the faith of an undertaking signed by the defendants in the following terms: "We, the undersigned, hereby agree and undertake to pay to Thomas Edwards, (the plaintiff,) all such rent as shall appear to be legally due to him from Edward Kelly, the tenant of part of the Barton of Rame and tenement Bastard Combe, up to the 25th day of Dec. 1815;" it was held, that the defendants were liable upon their undertaking, and that it was not within the mischief intended to be provided against by the statute. (k) The landlord, having dis-

(g) *Barker v. Birt*, 10 M. & W. 61. *Haigh v. Brooks*, 10 Ad. & E. 309; *ib.* 335, s. c. in error.

(h) *Barrell v. Trussell*, 4 Taunt. 117.

(i) *Meredith v. Short*, Salk. 25. *Castling v. Aubert*, 2 East, 325. *Walker v. Taylor*, 6 C. &

P. 752.

(k) *Edwards v. Kelly*, 6 M. & S. 204. *Williams v. Leper*, 3 Burr. 1887. *Bampton v. Pauline*, 12 Moore, 497. *Houlditch v. Milne*, 3 Esp. 86; 1 Wms. Saund. 211 d. 211 s. ed. 1845.

trained the goods, held them in his hands as a pledge for the rent; the debt in respect of such rent was for the time suspended, and the promise founded upon the relinquishment by the landlord of his lien upon the goods, was an original independent contract, and not a mere promise to answer for the debt of another.

But in these cases the plaintiff should so shape his case, as not to show or admit in his declaration, or upon the face of the pleadings, that there is a principal debtor liable, and that the promise of the defendant is a promise to pay that debt. (*l*)

SECTION III.

OF THE FORM AND REQUISITES OF THE WRITTEN MEMORANDUM REQUIRED BY THE FOURTH SECTION OF THE STATUTE OF FRAUDS.

THE NOTE OR MEMORANDUM of "*a special promise by an executor or administrator to answer damages out of his own estate,*" and of "*a special promise to answer for the debt, default or miscarriage of another,*" also of an "*agreement made upon consideration of marriage,*" and of a "*contract or sale of lands, tenements, and hereditaments, or any interest in or concerning them,*" and of an "*agreement that is not to be performed within the space of one year from the making thereof,*" must disclose the consideration for the promise or agreement. If it purports to be an agreement it must disclose a mutuality of contract and obligation between the parties to it, (*a*) if it be a note or memorandum of a promise simply, it must express the consideration for the promise, as well as the promise itself; (*b*) and the omission to state the consideration cannot be supplied by oral testimony of its existence.

"One of the cases," observes Bayley, J., "contained in the fourth section of the statute, is the case of a promise by an executor to answer

(*l*) *Clancy v. Pigott*, 2 Ad. & E. 473; 4 N. & M. 496; and 1 H. & W. 20, s. c. *Tomlinson v. Gell*, 6 Ad. & E. 564; 1 N. & P. 588, s. c. *Andrews v. Smith*, 2 C. M. & R. 631.

(*a*) *Sykes v. Dixon*, 9 Ad. & E., 695; 1 P. & D. 463, s. c. *Sweet v. Lee*, 4 Sc. N. R. 90.

(*b*) *Rann v. Hughes*, 7 T. R. 350, n. *Wain v. Walters*, 5 East, 17.

damages out of his own estate ; another of a special promise to answer for the debt, default or miscarriage of another person. Now at common law, in order to make a person chargeable in such cases, there must be a special consideration for the promise, either moving to the party promising, or from the party in whose favour the promise is made. Then the statute provides that a party shall not maintain an action in such cases, unless the *agreement* upon which such action is brought, or some memorandum or note thereof shall be in writing, and I think, therefore, that that memorandum must include a statement of the consideration for such agreement. . . . I find, too, that the word 'agreement' in this clause, is coupled with 'contracts of marriage, and for the sale of land ;' now, in those cases, it is clear that the consideration must be stated ; for it would be a very insufficient agreement to say, 'I agree to sell A B my lands,' without specifying the terms or the price, and if those could be supplied by oral evidence, we should let in all the mischief against which the statute meant to guard, viz. of having important parts of the contract proved by oral evidence." (c)

Of the form and requisites of a written guarantee.

All guarantees, or engagements, or undertakings in writing, to become responsible for the debts or defaults of third parties, must, consequently, disclose either in express terms, or by necessary implication, the *consideration*, or inducement, for the making or the giving of them.

The plaintiff brought an action upon a written engagement, or guarantee, for the payment of a debt of a third person, signed by the defendant, and expressed in the terms following : "Messrs. Wain and Co.—I will engage to pay you by half-past four this day, 5*6*l. and expenses on bill of that amount on Hall ;" and proposed to call witnesses to explain the cause of, and the consideration for, the giving of this note ; but it was holden, that such evidence was totally inadmissible, as it was the object of the statute of frauds to exclude parol evidence of the consideration, as well as of the promise. (d) So, where the undertaking or engagement of the defendant to pay a sum of money, due from a third party to the plaintiff on a bill of exchange, was in these words : "Mr. Wakefield, (the defendant,) will engage to pay the bill drawn by Pitman in favour of Stephen Saunders, (the plaintiff ;)" it was holden, that the note or memorandum was insufficient, as the consideration for the promise was not stated or shown in writing. (e)

(c) Bayley, J., *Saunders v. Wakefield*, 4 B. & Ald. 601.

(d) *Wain v. Walters*, 5 East, 10.

(e) *Saunders v. Wakefield*, 4 B. & Ald. 595.

The defendant had addressed a letter to the plaintiff in these words: "Gentlemen,—Inclosed I forward you the bills drawn per J. T. Armstrong upon, and accepted by, Leonard Dell, which I doubt not will meet due honour, but in default thereof, I will see the same paid;" and it was holden, that this letter was not a sufficient memorandum within the meaning of the statute, as the consideration for the promise was not stated therein. (*f*) And the following letters were held bad and nugatory for the same reason: "Sir,—I hereby *agree* to see you paid within three months from the date hereof, the amount of 5*l.*, due to you on account of Mr. George Moore, junr. of Sheffield." (*g*)

"Mr. R. H. Chace, of the Barbadoes, about to proceed thither in the Mary, having incurred an account with you, amounting to 49*l.* 5*s.* 0*d.*, with the understanding that he is to transmit the amount to you three months after he shall have arrived at Barbadoes, we guarantee his performance of the said engagement, and in failure thereof, we will be responsible to you." (*h*)

A guarantee, signed by the defendant, for the payment of the debt and costs in an action against a third party, in consideration of a stay of further proceedings, was in the words following:—

"Richard Ridley, plaintiff, and James Ashdown, defendant. We, the undersigned, jointly and severally, undertake and agree to pay G. C. Cole, gent., the debt and full costs in this action, provided on or before the 1st January, 1831, a sum of 11*l.* 10*s.* 3*d.*, be not paid to him, the said G. C. Cole, at his office, as the attorney for the plaintiff; dated 8th Nov. 1830." In the margin were the following letters and figures, "Debt 6*l.* 11*s.* 11*d.*, costs 4*l.* 18*s.* 4*d.*,—11*l.* 10*s.* 3*d.*;" and it was held, that this guarantee was within the operation of the statute of frauds, and could give no right of action, as the consideration was not stated and set forth upon the face of it. (*i*)

So, where the defendant, in order to obtain a supply of goods from one Cowing, who had been bankrupt, and had become destitute of credit, wrote a letter to the plaintiffs, who were Manchester warehousemen, to the following effect:—"Gentlemen,—To the amount of 100*l.* be pleased to consider me as security on Mr. James Cowing's account." And the plaintiffs, on the faith of this letter, supplied Cowing with goods of the value of 100*l.*; and Cowing, having again become bankrupt, and unable

(*f*) *Hawes v. Armstrong*, 1 Sc. 661; 1 Bing. N. S. 761. s. c.

(*g*) *Clancy v. Piggott*, 2 Ad. & E. 473; 4 N. & M. 496; and 1 H. & W. 20, s. c.

(*h*) *Ellis v. Levy*, 1 Sc. 669, n. (*a*).

(*i*) *Cole v. Dyer*, 1 C. & Jer. 461; 1 Tyr. 304, s. c.

to pay, the plaintiffs brought an action against the defendant, and produced the letter in evidence, and obtained a verdict; the court afterwards held that the amount could not be recovered, as the promise was a promise to answer for the debt of another within the statute, and there was no written evidence of the consideration. (*k*)

The construction that has been put upon the statute, by holding that *the consideration* for the promise, or undertaking, as well as *the promise* itself, must be expressed in writing, whether the guarantee be a guarantee for the payment of an *existing debt*, or for the payment of debts which have no existence at the time of the making of the guarantee, but which are *afterwards contracted* on the faith thereof, has probably been productive of more injustice, mischief, and distress, than would have arisen from all the fraud and perjury that the act was intended to prevent. But the rule of law, respecting the development of the consideration, has been considerably relaxed and modified by recent decisions. It has been held in the case even of guarantees for the payment of *existing* debts, that the consideration need not appear in express terms upon the face of the written memorandum. "It is sufficient, if the memorandum is so framed, that any person of ordinary capacity must *infer* from the perusal of it that such, and no other, was the consideration upon which the undertaking was given. Not that a mere conjecture, however plausible, that the consideration stated in the declaration was that intended by the memorandum would be sufficient to satisfy the statute: but there must be a well-grounded *inference* to be necessarily collected from the terms of the memorandum, that the consideration stated in the declaration, and no other than such consideration, was intended by the parties to be the ground of the promise." (*l*)

A debt being due from Major Walsh to the plaintiff, the defendant, who was the attorney of the Major, wrote a letter to the plaintiff in these terms:—"Major Walsh being again disappointed in receiving remittances, and being about to quit England, and you expressing yourself inconvenienced for the money, I enclose you his acceptance, payable here at two months. You may put your name to it as drawer, and may safely pay it away."—A bill drawn up in the defendant's hand-writing, and accepted by Major Walsh, was enclosed in this letter, and the plaintiff having put his name to it as drawer, requested the defendant to put his name upon it

(*k*) *Jenkins v. Reynolds*, 6 Moore, 86; 3 B. & B. 14, s. c. *Morley v. Boothby*, 10 Moore, 395; 3 Bing. 107, s. c. *Allnutt v. Ashenden*, 6 Sc. N. B. 127. *Bentham v. Cooper*, 5 M. & W. 621.

(*l*) *Tindal, C. J., Hawes v. Armstrong*, 1 Sc. 661; 1 Bing. N. S. 761, s. c. *Parke, B., Bentham v. Cooper*, 5 M. & W. 628. *Haigh v. Brooks*, 10 Ad. & E. 319, 320.

also; but the latter, on the 26th of March, answered, "I never put my name to bills, but *I will see it paid* for Major Walsh;" and the plaintiff then took the bill and circulated it, and so gave up and suspended, in point of law, his right of action against the Major for the space of two months, the time the bill had to run; and it was held in an action on the defendant's undertaking, that it appeared with sufficient certainty from the bill and the letters, what the consideration for it was, viz. "*the forbearance to take proceedings for the recovery of the debt until the bill became due.*" (m)

A letter, in the nature of a guarantee, in the following terms, was addressed by the defendant to the plaintiff:—"You will be so good as to withdraw the promissory note, and I will see you at Christmas, when you shall receive from me the amount of it, together with the memorandum of my son's, making in the whole 45*l.*; and it was held that the consideration, viz. the withdrawal of the note, was sufficiently stated, though neither the amount of the note, nor the maker's name, was specified. (n)

And as regards guarantees given to secure the *future* debts, or as an indemnity against the *future* defaults and miscarriages of third parties, if from a fair and reasonable construction of the written document, taken in connexion with surrounding circumstances and the situation of the parties, (o) it can be gathered with certainty what the consideration was, the guarantee is valid and effectual, and an action consequently may be maintained upon it. Where the guarantee was in this form, "I guarantee the payment of *any goods* which J. Stadt *delivers* to J. Nichols," it was held, that it sufficiently appeared upon the face of the writing itself what the consideration was, viz. a future supply of goods to Nichols; and that when the delivery of the goods took place, the consideration attached to the promise, and the defendant became liable for the payment of them. (p) And where the guarantee was, "I undertake to pay to Mr. Robert Jarvis, the sum of 6*l.* 14*s.* for a suit of, *ordered* by Daniel Page;" and it appeared that the plaintiff, to whom the guarantee had been given, was a sailor, and that a suit of clothes, of the value of 6*l.* 4*s.*, had been supplied by the plaintiff to Page *subsequently* to the giving of the undertaking, it was held, that it appeared with sufficient certainty that the consideration was the future delivery of goods already ordered. (q)

The defendant gave the following note to the plaintiffs:—"I hereby

(m) *Emmett v. Kearns*, 7 Scott, 687; 5 Bing. n. s. 559; 7 Dowl. P. C. 630. *Watson v. Mauckell*, 14 Law J. Rep. n. s. Excheq. 54.

(n) *Shortrede v. Cheek*, 1 Ad. & E. 57; 3 N. & M. 866, s. c.

(o) See post, ch. 5, sec. 2. *Keate v. Temple*, 1 B. & P. 168.

(p) *Stadt v. Lill*, 9 East, 348.

(q) *Jarvis v. Wilkins*, 7 M. & W. 410.

guarantee the present account of Miss Harriet Moseley, due to R. S. T. and Co., (the plaintiffs,) of 112*l.* 4*s.* 4*d.*, and *what she may contract* from this date to the 30th of September next;" and it was held, that the account existing at the time of the giving of the guarantee might be looked at, in order to ascertain the nature of the articles furnished; and that it appeared with sufficient certainty that the consideration was a future supply of articles of a similar character and description. (r)

The defendant addressed the following letter to the plaintiffs:—"I do hereby agree to become security for Mr. R. G., *now your traveller*, in the sum of 500*l.*, for all money he *may receive* on your account;" and it was held, that it appeared by necessary inference from the terms of the written instrument, that the consideration for the guarantee was the *continuance* of the traveller *in the service of the plaintiffs*. (s) So again, where the defendant's letter to the plaintiff was in these words:—"Sir, I, the undersigned, do hereby agree to bind myself to be security to you for Mr. John Corcoran, *late* in the employ of Mr. J. Pearson, of London Wall, for whatever, *while in your employ*, you may intrust him with, to the amount of 50*l.*; and in case of any default to make the same good;" it was held, that it appeared with sufficient certainty on the face of the guarantee, that the consideration was a prospective employment of Corcoran by the plaintiff, and entrusting him while in his service." (t) And in a more recent case, where the defendant wrote as follows to the plaintiffs:—"Gentlemen, I hereby guarantee to you the sum of 250*l.*, in case Mr. Paddon, of, &c., should *default* in his capacity of agent and traveller to you;" it was holden that the consideration, viz. the *future employment* of Paddon, was disclosed with sufficient certainty on the face of the guarantee. (u)

If a guarantee resolves itself into two distinct promises or undertakings, the one bad and the other good, the latter may be severed from the former, and may be made to support an action. Thus, where the defendant gave to the plaintiffs the following guarantee:—"Gentlemen, I hereby undertake to secure to you the payment of any sums of money you *have advanced*, or *may hereafter advance*, to Messrs. Davenport and Co., on their account with you, commencing on the 1st November, 1831, not exceeding 2,000*l.*; it was holden that the latter part of the guarantee, to secure *past* advance, was invalid, as there was no consideration at all to support it, but that the promise to secure the payment of *future* advances

(r) *Russell v. Moseley*, 6 Moore, 521; 3 B. & B. 211, s. c.

(s) *Ryde v. Curtis*, 8 D. & R. 62.

(t) *Newbury v. Armstrong*, 3 M. & P. 509; 6 Bing. 201; Moo. & M. 889, s. c.

(u) *Kenaway v. Treleavan*, 5 M. & W. 499.

was good, and that the consideration for it sufficiently appeared upon the face of the guarantee. (x) The past advances constituted an existing debt, and no consideration being stated for the promise to pay such debt, the guarantee as to that was clearly bad. But if there be a valid consideration in point of fact, the mere statement of it in the past tense would not invalidate the guarantee. All that the statute requires is, that the consideration should be stated, it need not be expressed in words of form, or with technical accuracy, as upon the face of a declaration.

The plaintiff had chartered his ship to one Livie for a voyage, at certain agreed freight, one half of which was to be paid in cash, and the remainder by an "*approved bill*." The voyage was performed, and the freight earned, and half was paid in cash, and the plaintiff demanded the "*approved bill*," and thereupon the defendants, in consideration that the plaintiff would take Livie's acceptance of a bill in payment of the residue of the freight, promised the plaintiff to be answerable to him for the amount of such acceptance, if the bill should not be paid when due; and as a security to the plaintiff for the performance of his contract, he handed him the following letter :—" Sir, Mr. Livie *having chartered* your ship to bring a cargo of timber, &c., and the same *being landed* to the charterer, and he *having paid* you one-half of the freight, and *given you* his acceptance for the remaining half at four months' date, I engage to be accountable to you for the amount of the said acceptance, should it be not paid when due; and the court held that the consideration was sufficiently stated, though it appeared on the face of the guarantee to be a *past* consideration. (y) It had been agreed in this case that the guarantee should be given by the defendant *before* the bill was drawn, and the plaintiff had taken the acceptance at the express request of the defendant, and in consideration of the guarantee given by the latter. The transaction had been settled and agreed upon before the guarantee was written, and it was consequently inadvertently described in the past tense, the circumstances leading to and inducing the promise being omitted.

By bringing such a guarantee or undertaking into contact with the objects and circumstances to which it refers, (z) the consideration appears with certainty, and is sufficiently stated in writing to satisfy the statute of

(x) *Raikes v. Todd*, 1 P. & D. 138; 8 Ad. & E. 846, s. c. *Wood v. Benson*, 2 C. & J. 94. In *Chater v. Becket* and *Thomas v. Williams*, the declaration stated the entire promise, as well that part which was void, as that which was good; and there was a failure of the proof of the

contract as stated in the declaration.

(y) *Pace v. Marsh*, 8 Moore, 59. *Boehm v. Campbell*, 3 Moore, 15. *Shelton v. James*, 13 Law J., n. s.; Q. B. 90. *Jarvis v. Wilkins*, 7 M. & W. 410.

(z) Post, ch. 5.

Frauds, although inartificially expressed according to the rules of pleading. (a) In drawing a declaration upon it, care of course must be taken not to set it out literally, so as to show an executed consideration upon the record.

A guarantee in the following form was given by the defendant to the plaintiff:—"In consideration of your *being in advance* to Messrs. John Lees and Co. in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for that amount, say (10,000*l.*) on their behalf; and it was held, that whether the consideration, "your *being in advance*," was, or was not, a good consideration, depended upon the transaction to which the guarantee referred. "Being in advance does not necessarily mean," observes Denman, C. J., "that the plaintiff was in advance at the time of the giving of the guarantee. It may have been intended as prospective. If the phrase had been, 'in consideration of your becoming in advance,' or 'on condition of your being in advance,' such would have been the clear import." . . . "In the opinion of all the court," observes Lord Abinger, in pronouncing the judgment of the Court of Exchequer Chamber, "there was in the guarantee an ambiguity that might be explained by evidence, so as to make it a valid contract." (b)

If any consideration is stated upon the face of the guarantee, the court will not take notice of its inadequacy.

A guarantee drawn up in the following terms was handed to the plaintiff:—"I hereby guarantee to you the payment of the proceeds of the goods you have consigned to my brother, John Tooth, of Sydney, and also of any future shipments you may make to him, in consideration of the sum of 2*s.* 6*d.* paid to me, which I hereby acknowledge to have received;" and it was held that the pecuniary consideration stated on the face of the guarantee was sufficient. (c)

Care must be taken in all cases to mark the distinction between a consummate and perfect guarantee, and a mere *proposal*, or *offer*, or *tender* of a guarantee, which must be accepted, and the acceptance notified to the maker, and his final assent to the engagement be obtained, ere it can become a perfect and conclusive contract.

The defendant wrote a letter to the plaintiffs to the following effect:—"Gentlemen,—As I understand Messrs. Anderson and Co. have given you an order for rigging, &c., which will amount to about 4,000*l.*, I can assure

(a) *Payne v. Wilson*, 7 B. & C. 423. *Walton v. Maskell*, 2 Dowl. & Lw. 410; 13 M. & W. 73, s. c.

(b) *Haigh v. Brooks*, 10 Ad. & E. 319. *Brooks*

v. Haigh, ib. 334, s. c. in error. As to continuing guarantees, see post, ch. 5, § 2.

(c) *Dutchman v. Tooth*, 7 Sc. 710.

you, from what I know of their honour and probity, you will be perfectly safe in crediting them to that amount; indeed *I have no objection* to guarantee you against any loss from giving them this credit." This letter was given by the defendant to Anderson and Co., who handed it over to the plaintiffs, and the latter thereupon furnished the rigging and other articles, and being unable to procure payment from Anderson and Co., they brought an action against the defendant upon the letter, treating it as a guarantee; but it was held that the letter did not import a perfect and conclusive guarantee, but only a *proposition tending to a guarantee*, that the words, "I have no objection to guarantee you against any loss from giving them this credit," merely meant, that if an application was made to the defendant he would guarantee; that it was a mere overture or offer on his part, and that if the plaintiffs had accepted it, and intended to treat it as a guarantee, they ought to have given notice to the defendant that they had accepted it, and intended so to regard it; or that there should have been some subsequent consent on the part of the plaintiff to convert that which was a mere proposal or offer, into a conclusive and absolute engagement. (d) So, where an action was brought upon a letter, addressed to the plaintiffs in the following terms:—"Gentlemen,—Mr. France informs me that you are about publishing an arithmetic for him and another person, and I have *no objection* to being answerable as far as 50*l.* For my reference, apply to Messrs. Brooke and Co. of this place;" which letter had been signed by the defendant, and given to Mr. Brooke, and forwarded by him to the plaintiffs, who proceeded with the publication without ever communicating with the defendant; it was held that the transaction "could not be tortured into a consummate and perfect contract;" that it was a mere offer or proposal, requiring an answer, and that as the plaintiffs had not communicated their acceptance of it to the defendant before they proceeded to act upon it, they could not treat it as an absolute and conclusive engagement, capable of sustaining an action, and they were therefore nonsuited. (e)

Contracts for the sale and purchase of LAND or REALTY.

The language of the *fourth* section of the Statute of Frauds relating to contracts for the sale and purchase of land, and interests therein, differs materially from the *seventeenth* section relating to the sale of goods and chattels. The former section enacts, that no action shall be brought

(d) *M'Iver v. Richardson*, 1 M & S. 557.
Gannet v. Hill, 1 Stark. 10.

(e) *Morley v. Tinkler*, 1 C. M. & B. 692; 1

Gale, 11; 5 Tyr. 416, s. c. As to when expressions in a letter amount to an absolute guarantee, see *Jones v. Williams*, 7 M. & W. 493.

whereby to charge any person upon any contract for the sale of lands, &c., "unless the *agreement upon which such action shall be brought*, or some memorandum or note thereof shall be in writing, signed by the party to be charged," or his agent, &c.; whilst the latter section declares, that no contract for the sale of goods and chattels of the value of 10*l.* sterling and upwards, "*shall be allowed to be good*," unless there has been a part payment, or part acceptance, or earnest, or unless there be "*some note or memorandum in writing of the bargain*, signed by the party," &c., or his agent.

The note or memorandum of the "agreement for the sale and purchase of lands, tenements, or hereditaments, or of any interest in or concerning them," need not be drawn up in technical language, or in words of form, but there must be written evidence of an "*aggregatio mentium*," or mutual agreement, on the part of the vendor and purchaser to sell and to buy (*f*); and both the subject matter of the sale and the price to be paid for it, must be specified. More fulness and particularity are required in the written evidence of the special promises and agreements included in the *fourth* section, than of the bargain made on a sale of goods, within the *seventeenth* section of the statute. (*g*)

The requisite written evidence of the contract may be established as in the case of contracts for the sale and purchase of goods through the medium of letters and separate documents, containing references to each other. Any printed papers or communications in writing which may have passed between the parties, forming on the face of them part of one connected transaction, may be incorporated and construed together, and made to establish the requisite written evidence of an "agreement," (*h*) or of the consideration for a guarantee or other special promise within the fourth section of the statute. (*i*) But the agreement, or the consideration for the promise, must appear upon the face of the written instruments themselves, when placed in juxtaposition, and cannot be established in any way through the medium of oral testimony. (*k*)

In the Institutes it is observed, that contracts of purchase and sale being established by "consent alone," may be entered into by absent parties through the medium of letters or messengers; but that in all con-

(*f*) See ante, ch. 2, sec. 2, as to contracts founded upon mutual promises, and a mutuality of obligation.

(*g*) Bayley, J., *Saunders v. Wakefield*, 4 B. & Ald. 601. *Hughes v. Parker*, 8 M. & W. 247. *Hubert v. Turner*, 4 Sc. N. R. 505, 508.

(*h*) *Bird v. Blosse*, 2 Vent. 361. *Dobell v. Hutchinson*, 3 Ad. & E. 355. *Richards v. Hay-*

ward, 2 Sc. N. R. 670. *Howe v. Booth*, 4 Sc. N. R. 526, 559.

(*i*) *Moore v. Hart*, 1 Vern. 110. *Coe v. Duffield*, 7 Moore, 252. *Stead v. Liddard*, 8 Moore, 2; 1 Bing. 4, s. c. *Sandilands v. Marsh*, 2 B. & Ald. 680. *Jones v. Williams*, 7 M. & W. 499.

(*k*) Post, ch. 5, s. 2.

tracts by consent the parties must be bound to each other mutually ; and that it is always necessary in the case of contracts of purchase and sale, that the price should be agreed upon, for until that is settled there can be no contract. "The price," it is said, "ought to be certain. Formerly, when it was agreed that a thing should be sold at a price to be determined by a third party, it was doubted whether the sale was good or not. But we have decreed that a contract of sale entered into upon such terms shall stand good ; so that if the person appointed fixes the price, such price must be paid, and the thing sold, delivered, and the contract of sale consummated and accomplished ; otherwise the buyer shall have an action against the seller, or the seller against the buyer. But if the person appointed to fix the price either refuses or is unable to do it, the sale comes to nothing, for want of an ascertainment of the price. (*l*)

Any misdescription of the estate or interest bargained for, and agreed to be purchased and sold, or of the nature, or situation, or extent of the property in a material and substantial point, so far affecting the subject matter of the contract, that it may reasonably be supposed that but for such misdescription, the contract would never have been made, at once releases the purchaser from the bargain. And if the conditions and particulars of sale provide that errors and mistatements shall not vitiate the sale, but that an abatement shall be made in the purchase money, by way of compensation, the provision will extend only to unintentional errors and mistatements in matters of detail, not materially altering the nature of the subject matter of the contract itself ; (*m*) for no man is bound to take an estate or interest essentially different from that which he agreed to purchase. (*n*)

If an estate be sold by auction in distinct and independent lots at separate prices, it has been held, that a separate contract is created as to each lot. (*o*) But it is otherwise, if a contract be made for the purchase of several lots at an aggregate price ; (*p*) or if the several lots be so connected together that the possession of all is essential to the use and enjoyment of any one or more of them, and they have consequently been purchased by the vendee as one property. (*q*)

(*l*) *Justiniani Institut. Lib. iii., tit. 23. De obligationibus ex consensu, tit. 24. De emptione et venditione, § 1. De pretio certo, vel incerto, vel in arbitrium alienum collato.* See also § 2. In quibus pretium consistat. *Elmore v. Kingscote*, 8 D. & R. 343 ; 5 B. & C. 583, s. c. *Hoadley v. Macdaine*, 4 M. & Sc. 340 ; 10 Bing. 482, s. c.

(*m*) *Flight v. Booth*, 1 Bing. N. S. 377 ; 1 Sc. 190, s. c. *Dykes v. Blake*, 4 Bing. N. S.

463 ; 6 Sc. 320, s. c.

(*n*) *Farrer v. Nightingale*, 2 Esp. 640. *Jones v. Edney*, 3 Campb. 285.

(*o*) *Emerson v. Heelis*, 2 Taunt. 38. *James v. Shore*, 1 Stark, 426. *Roots v. Lord Dormer*, 4 B. & Ad. 77.

(*p*) *Dykes v. Blake*, 4 Bing. N. S. 463 ; 6 Sc. 320, s. c.

(*q*) *Chambers v. Griffiths*, 1 Esp. *Gibson v. Spurrier*, 2 Peake, N. P. C. 49. *Boyer v.*

Of the signature to the memorandum.—The fourth as well as the seventeenth section of the statute of frauds, requires the note or memorandum to be signed only by “the party to be charged.” The signature of the party seeking to enforce the contract, consequently, is not necessary. (r)

If a man writes his name in the first person, as “I, James Crockford, agree, &c.,” this is a sufficient signature. (s) So, if he writes his name against an entry or memorandum in a book or ledger, or indorses his name on printed particulars of sale, printed handbills, or printed descriptions, this is a sufficient signature, and the name may, as previously mentioned, be written in pencil as well as in ink. (t)

A man may sign also by his initials or by his mark, (u) and it is quite immaterial upon what part of the paper the mark or signature is to be found. “The cases have decided that although the signature be in the beginning or the middle of the instrument, it is as binding as if placed at the foot of it, the question being always open to the jury, whether the party having regularly signed it at the foot meant to be bound by it as it stood, or whether it was left so unsigned, because he refused to complete it. (x) But the signature, wherever placed, must, of course, be made with a view of authenticating the document as a concluded contract, and not with a view merely of altering or settling a draft, or approving of propositions and proposal not finally arranged and decided upon. (y)

Signature by agents.—The authority of the agent to sign and execute the leases, assignments, and surrenders, mentioned in the first and third sections of the statute of frauds, must now be constituted by *writing* under SEAL. (z)

The fourth and seventeenth sections of the statute respecting contracts for the purchase and sale of lands, or of some estate or interest therein, to be created or transferred at a future period, and not passing any immediate estate, promises by executors and administrators, to be answerable out of their own estates, promises to answer for the debt or default of another, agreements in consideration of marriage, agreements not to be performed within a year, and contracts for the sale of goods and chattels,

Blackwell, 3 Anstr. 657 : *Sugd. Vend. & Pur.* i. p. 517.

(r) *Laythoarp v. Bryant*, 2 Bing. N. S. 735, 3 Sc. 233, a. c. *Thorn v. Kempster*, 5 Taunt. 788.

(s) *Knight v. Crockford*, 1 Esp. 190. *Taylor v. Dobbins*, 1 Str. 399. *Saunderson v. Jackson*, 2 B. & P. 239.

(t) *Geary v. Physick*, 5 B. & C. 234 ; 7 D. & R. 653, a. c. *Jeffery v. Wallon*, 1 Stark. 267.

(u) *Best, C. J., Hubert v. Moreau*, 12 Moore, 219. *Phillimore v. Barry*, 3 N. & P. 223, 1 Campb. 513, a. c. *Baker v. Dening*, 8 Ad. & E. 94. *Hyde v. Johnson*, 2 Bing. N. S. 780.

(x) *Lord Abinger, C. B., Johnson v. Dodgson*, 2 M. & W. 659.

(y) *Sugd. Vend. and Purch.* 159—179.

(z) 7 & 8 Vic. c. 76, post, ch. 9, sec. 1, PRINCIPAL AND AGENT.

do not render it necessary that the agent should obtain his authority by any written instrument. It has been holden, consequently, with regard to these contracts and promises, that the name of the party sought to be charged, printed by a printer in particulars of sale, or any other printed paper embodying the terms of the contract, may be a signature by "a person lawfully authorised," within the meaning of the statute. If the party has recognised and adopted his printed name or signature, if he has sanctioned or permitted the distribution of printed handbills, or printed particulars of sale, in which his name appears, there has been a signature by an agent duly authorised, upon the principle that the subsequent sanction or adoption of the printed name or signature is equivalent to an antecedent authority to the printer to print it. (a) But the mere introduction of a name into a written or printed paper unrecognised by the party, and not brought home to him as having been written or printed by his authority, is, of course, no signature within the meaning of the statute. (b)

An auctioneer effecting a sale by auction, or an auctioneer's clerk taking down the biddings, is the authorised agent of the vendor and purchaser, enabled to sign for both or either of the parties, so as to satisfy the statute of frauds ; (c) but neither of the contracting parties themselves can be the agent of the other for such a purpose ; (d) nor can a mere clerk or traveller of one party be an agent to bind the other, unless it be shown that he has received specific and express authority so to do. (e)

SECTION IV.

OF STAMPS ON CONTRACTS.

By various acts of parliament made for the purpose of increasing the revenue of the country, it has been enacted, that "every skin, or piece of

(a) *Schneider v. Norris*, 2 M. & S. 288. *Maclean v. Dunn*, 1 M. & P. 766. *Saunderson v. Jackson*, 2 B. & P. 238.

(b) *Hubert v. Turner*, 4 Sc. N. R. 506.

(c) *Hinde v. Whitehouse*, 7 East, 568. *Em-*

merson v. Heelis, 2 Taunt. 38. *White v. Proctor*, 4 Taunt. 209 ; *Sugd. Vend.* 188 — 191.

(d) *Wright v. Dannah*, 2 Campb. 203.

(e) *Graham v. Musson*, 7 Sc. 769. *Graham v. Fretwell*, 4 Sc. N. R. 25.

vellum, or parchment, or sheet, or piece of paper," upon which certain classes and descriptions of deeds, agreements, bills of exchange, promissory notes, and receipts are ingrossed, written, or printed, shall be charged with certain duties, and be marked with certain stamps, and shall not be pleaded or given in evidence in any court, or be admitted in any court to be good, useful, or available in law or equity, unless the same be duly stamped in manner therein mentioned.

These statutes do not require any description of contract to be reduced into writing for the purpose of being stamped; they simply provide that when expressed in writing, the paper, parchment, or vellum upon which the contract is written, shall not be received in evidence or have any legal force or validity, unless a stamp of a specified value and amount has been affixed to it.

Stamps on deeds.—Some of the provisions of the various statutes imposing stamps on deeds have been shortly referred to in a previous chapter. (*a*)

By the last general stamp act, (55 *Geo.* 3, *c.* 184,) which regulates the *ad valorem* stamp upon bonds, (*b*) conveyances, (*c*) grants, leases, (*d*) assignments, and surrender of leases, (*e*) mortgages, (*f*) assignments and transfers of mortgages, (*g*) indorsements on mortgage deeds, declarations of trust, (*h*) deeds of partition, assignments, bills of sale, (*i*) and almost every class and description of contract under seal, and on all attested and authenticated copies, (*k*) extracts, and memorials of deeds, according to the provision of a schedule thereto annexed, it is enacted that every "DEED of any kind whatever, not otherwise charged in this schedule, nor expressly exempted from all stamp duty," shall be stamped with a 1*l.* 15*s.* stamp. "And where the same, together with any schedule, receipt, or other matter put or endorsed thereon, or annexed thereto, shall contain 2,160 words or upwards, then for every entire quantity of 1,080 words contained therein, over and above the first 1,080 words, a further progressive duty of 1*l.* 5*s.*" (*l*) There is, then, an exemption from all duty in favour of contracts made "for promoting the residence of the parochial clergy, by making provision for building, repairing,

(*a*) Ante p. 11.

(*b*) 7 *M. & W.* 590.

(*c*) 2 *Ad. & E. N. S.* 321.

(*d*) 12 *M. & W.* 401; 2 *Esp.* 595.

(*e*) 11 *Ad. & E.* 796.

(*f*) 11 *M. & W.* 561; 4 *Ad. & E. N. S.* 475.

(*g*) 8 *Ad. & E.* 248; 4 *Ad. & E. N. S.* 615.

(*h*) 11 *M. & W.* 812.

(*i*) 5 *M. & S.* 228; 12 *East*, 471.

(*k*) *Attested* copies of deeds must be stamped before they can be given in evidence, but an *un-attested* copy may be read without a stamp, when the original is in the hands of the opposite party, and he has refused to produce it after notice. *Braythwaite v. Hitchcock*, 10 *M. & W.* 494.

(*l*) See the general exemption at the end of Part I., of the Schedule.

or purchasing houses and other buildings, for the use of their benefices, also relating to the sale and redemption of the land-tax, and all transfers of shares in the funds, leases, conveyances, and other instruments relating to the land revenues of the crown, and all contracts relating to the transportation of convicts. (m)

Bills of exchange, drafts, or orders for the payment of money.

The amount of stamp duty on bills of exchange, drafts, or orders for the payment of money, is regulated by the several amounts of such bills, drafts, or notes, and the time they have to run. It is provided in the schedule of the act, that every inland bill, draft, or order for the payment of money, weekly, monthly, or at any other stated period, if made payable to "the bearer," or to "order," or if delivered to the payee or some person on his or her behalf, where the total amount of the money thereby made payable, shall be *specified therein*, or can be *ascertained therefrom*, shall be charged with the same duty, as on a bill payable to bearer or order on demand, for a sum equal to such total amount; but where the total amount of money thereby made payable shall be *indefinite*, the same duty as on a bill on demand for the sum *therein expressed* only. And it is provided and enacted, that all drafts or orders for the payment of any sum of money by a bill or promissory note, or for the delivery of any such bill or note in payment or satisfaction of any sum of money; where such drafts or orders shall require the payment or delivery to be made *to the bearer or to order*, or shall be *delivered to the payee*, or *some person on his or her behalf*, and also all receipts given by any banker or bankers, or other person or persons, for money received, which shall entitle, or be intended to entitle, the person or persons paying the money, or bearer of such receipts, *to receive the like sum from any third person or persons*, shall be deemed, and taken to be bills, drafts, or orders for the payment of money, within the meaning of the act. Also all bills, drafts, or orders for the payment of any sum of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, *if the same shall be made payable to the bearer*, or *to order*, or if the same shall be *delivered to the payee*, or *some person on his or her behalf*. There is, then, an express exemption from all duty in favour of drafts or orders for the payment of money to the bearer on demand, drawn upon any banker, or person acting as such, (n) residing or transacting business within ten

(m) For the several rates of duty chargeable upon various contracts, see the schedule 55 Geo.

3, cap. 184.

(n) *Castleman v. Ray*, 2 B. & P. 383; *ex parte*

(now fifteen) miles (*o*) of the place where such drafts or orders shall be issued, provided such place (*p*) shall be specified in such drafts or orders, and *the same shall bear date on or before the day on which they shall be issued*; (*q*) and provided the same do not direct the payment to be made by bills or promissory notes. Also in favour of bills of exchange, or bank post bills, issued by the Governor and Company of the Bank of England, and certain specified bills and orders for the payment of money in and about the public service.

It was the object of the legislature to treat as promissory notes and bills of exchange, and to subject to stamp duty all such drafts and orders as being payable on a contingency, or out of a particular fund, would not otherwise, in strictness of law, have fallen under that denomination. (*r*)

A letter from F. and Co. to their correspondents, requesting them to pay to H. and Co., or their order out of the first proceeds of goods in their hands, the sum of 600*l.*, and charge the same to their account, was held to require an *ad valorem* stamp as a bill of exchange. Such a letter cannot be given in evidence under an agreement stamp. (*s*)

In determining whether an order for the payment of money is a bill of exchange within the meaning of, or according to the definition given by, the act, the first thing to be determined is whether it is an order for the payment of a *sum certain* on which the duty can attach, and the next, whether it is made payable *to the bearer*, or *to order*, or has been *delivered to the payee, or to some person on his behalf*.

With regard to the first point, it will be observed that the duty is imposed on the money directed to be paid by such order whenever the "total amount" of such money "shall be specified therein, or can be ascertained therefrom." If the total amount is "indefinite" and uncertain, the same duty is charged as on a bill on demand "for *the sum therein expressed only*." If, therefore, *no sum* whatever is expressed in the bill, and the total amount made payable is indefinite, and cannot be ascertained, there is nothing to determine the amount of the stamp duty, and the instrument cannot consequently be stamped at all as a bill of exchange, draft, or order, for the payment of money within the act. Thus where the consignor of goods sent to the consignee the following order, "Please to pay to N., on account of O. and Co., the proceeds of a ship-

Wilson, 1 Atk. 218.

(*o*) 9 Geo. 4, c. 49. s. 15.

(*p*) Walters v. Brogden, 1 Y. & J. 457.

(*q*) Allen v. Keves, 1 East, 435. Whit-

well v. Bennett, 3 B. & P. 359. Martin v.

Morgan, 8 Moore, 635. Field v. Woods, 7 Ad. & E. 114. Dawson v. McDonald, 2 M. & W. 26; ib. 52.

(*r*) Firbank v. Bell, 1 B. & Ald. 39.

(*s*) Butts v. Swan, 2 B. & B. 78.

ment of twelve bales of goods, value about 2,000*l.*," which the consignee, by letter in return, agreed to do: it was held that neither of the two instruments required such a stamp as the stamp acts impose on bills, drafts, or orders, for the payment of money, on the ground that no sum certain was mentioned or expressed in the order. (*t*) And where one Streather, being indebted to Messrs. Isaac Solly and Sons, gave them the following letter, addressed to the defendant: "Sir,—I shall feel obliged by your paying to Messrs. Isaac Solly and Sons *the balance* due to me for building the Baptist College Chapel, &c., and their receipt shall be a sufficient discharge to you as treasurer of such chapel;" and this letter being forwarded by the payees to the defendant, the latter wrote in reply: "Gentlemen,—I have received your letter, inclosing Mr. Streather's, and shall be happy to make the payment to you instead of to him, as requested:" it was held that the order clearly could not be stamped as a bill, draft, or order, for the payment of money, as *no sum at all* was expressed upon the face of it. (*u*)

And with regard to the second point as to the *delivery of the order to the payee, or some person in his behalf*, it has been held, that the act means a delivery either personally to the payee, or to some agent or representative of his, and does not mean a delivery to the person to whom the order is addressed, and that a letter simply authorising the payment of a specified sum of money, addressed and sent to a party, to be kept by him as his voucher and authority for the making of the payment ordered, is not an instrument requiring a stamp as a bill, draft, or order, for the payment of money, delivered to a person on behalf of the payee, within the meaning of the act.

A letter to the following effect was addressed to the defendants,—
 "Gentlemen,—We now authorise you to pay to Messrs. Royds and Co., (having revoked the former order in their favour,) after you have paid yourselves the balance we owe you from the net proceeds of our shipments, &c., one half of the remainder of the proceeds of the said shipments, provided the same shall not exceed the sum of 5,000*l.*" The defendants then wrote to Messrs. Royds and Co., the payees, assenting to this order or authority, and engaging to pay them, after they had liquidated their own debt, a proportion of the remainder of the proceeds of the said shipments not exceeding the sum of 5,000*l.*; and it was held that the order so sent to the defendants, and accepted by them, had not been delivered to them on behalf of the payee within the meaning of the act,

(*t*) *Jones v. Simpson*, 3 D. & R. 545.

Bing. 372 s. c.

(*u*) *Crowfoot v. Gurney*, 2 M. & Sc. 473; 9

as they were to keep it in their own hands, for their own security as their warrant and authority to make the payment, and were to hold it on their own account and for their own use, and not as agents for or on behalf of the payee. (x)

STAMPS ON PROMISSORY NOTES.

The statute 55 Geo. 3, c. 184, further provides for the amount of stamp duty to be paid on all promissory notes payable to the bearer on demand, or in any other manner than to the bearer on demand; also on all promissory notes for the payment of any sum of money by instalments, or for the payment of several sums of money at different days or times, *so that the whole of the money to be paid shall be DEFINITE and CERTAIN.*

The amount of duty is regulated as in the case of bills of exchange by the amount of the note, and the time that it has to run. It is provided, also, that all receipts for money deposited in any bank, or in the hands of any banker or bankers which shall contain any agreement or memorandum importing that interest shall be paid for the money so deposited, shall be deemed and taken to the promissory notes within the intent and meaning of the act. Also all notes, promising the payment of any sum or sums of money, out of any particular fund, which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen; if the same shall be made payable to "the bearer" or to "order," and if the same shall be *definite and certain*, and not amount in the whole to 20*l.* But if such notes shall not be made payable to the bearer or to order, or if made payable to the bearer or order, if the same shall amount to 20*l.*, or be indefinite, they are exempted from duty as promissory notes, and made liable to the duty which may attach on them as agreements, (y) as are also all other instruments bearing in any degree the form or style of promissory notes, but which in law may be deemed special agreements, and which are not thereby expressly directed to be deemed promissory notes.

All promissory notes for the payment of money, issued by the Governor and Company of the Bank of England, are expressly exempted from all stamp duties.

Any words in writing, importing a promise to pay a sum certain absolutely, and at all events are promissory notes within the meaning of the stamp acts, and must be stamped accordingly.

(x) *Hutchinson v. Heyworth*, 9 Ad. & E. 400, 9 M. & W. 411.
401; 1 P. & D. 266 a. c. *Walker v. Rostron*, (y) Post p. 126

The defendant signed an instrument in this form, "John Mason, 14th February, 1836, borrowed of Mary Anne Mason, his sister, 14*l.* in cash as per loan, in promise of *payment* of which I am truly thankful for, and shall never be forgotten;" it was contended that this was an undertaking to pay in thanks and not money; but it was held by Williams, J., that the instrument clearly imported a promise to repay money borrowed, and was, therefore, a promissory note within the definition of the stamp act, and ought to have been stamped as such. (z) A letter in the following form, "I have received the imperfect books, which, together with the cash overpaid on the settlement of your account, amounts to 80*l.* 7*s.*, which sum *I will pay* in two years," is a promissory note, and must be stamped. (a)

But if the writing displays a conditional promise, a promise to pay a *sum certain* upon some contingency, or the happening of some uncertain event, and the money mentioned therein is not made payable "to bearer" or "order," such writing must, according to the provisions of the act, be stamped as an *agreement* and not as a promissory note. So if it displays a conditional promise to pay a sum certain exceeding 20*l.* to "the bearer" or "order," out of a fund which may or may not be available, or upon a condition or contingency; it must be stamped as an agreement, and if it is an absolute promise to pay a sum altogether *uncertain* in amount, then it requires no stamp at all, either as an agreement, or as a promissory note. (b)

The following written promise was held to be an absolute promise, and as such a promissory note and not an agreement.

"On demand, I promise to pay to Mr. William Stretton the sum of 50*l.*, in consideration of his foregoing and forbearing an action at law in the Court of Queen's Bench, for damages ascertained by consent to amount to that sum, by reason of the injuries sustained by his wife in respect of my non-repair of a footway." (c)

The following instruments have, on the other hand, been held to be agreements, on the ground that they are not promises to pay one definite ascertained sum of money, but entire promises to pay a certain, and an uncertain sum of money, "I promise to pay to James Eastling, my carter, the sum of 65*l.*, with the lawful interest for the same, *and also all other sums of money which may be due to him.*" (d) "I have received

(z) *Ellis v. Mason*, 7 Dowl. P. C. 598.

(a) *Wheatley v. Williams*, 1 M. & W. 533.

(b) *Cox v. Bailey*, 6 M. & Gr. 195, and see post as to agreements not amounting to 20*l.* in

value.

(c) *Shelton v. James*, 13 Law J. Rep. N. S. (Q. B.) 90.

(d) *Smith v. Nightingale*, 2 Stark. 376.

the sum of 20*l.* which I have borrowed of you, and I have to be accountable for the said sum, *with legal interest.*" (e)

"I promise to pay to A. or order the sum of 13*l.* on demand for value received, with interest at 5*l.* per cent., and all fines, according to rule." (f)

The following written promises and undertakings have been held also to be agreements, and as such to require an agreement, and not a promissory note stamp. "Received and borrowed of Timothy Bolton, the sum of 30*l.*, which I do hereby promise to pay with interest, at the rate of 5*l.* per cent. I also promise to pay the demands of the sick club at *Ha-worth*, in the county of York, in part of interest, and the remaining stock and interest to be paid on demand to the said Timothy Bolton." "The amount of the sick club charges," observes Parke, J., "was uncertain; so, therefore, was the sum to be paid by Dugdale; the instrument, so far as regarded this contingent demand, could not be a promissory note, and the transaction was entire." (g)

A note in the following form:—"I agree to pay to Mr. Charles Davies, or his order, the sum of 695*l.*, at four instalments, viz., the first instalment to be paid on Monday next, being 200*l.*; the second, on the settling day at Doncaster after the St. Leger, being 150*l.*; the third, on the settling day after Epsom, being 150*l.*; and the fourth, on &c., being 100*l.*," was held to be thus far a promissory note only; but as it went on to say, "95*l.* to go as a set-off for an order of Mr. Reynolds to Mr. Thompson, and the remainder of his debt owing from C. Davies to him;" it was held that such ending and termination of the document took away from it the character of a promissory note, and made it an agreement." (h)

The defendant gave to the plaintiff a memorandum in the following form:—"I undertake to pay to Mr. Robert Jarvis, the sum of 6*l.* 4*s.*, for a suit of clothes, ordered by Daniel Page;" and it was held that this was not a promissory note, but a guarantee or agreement respecting the sale of goods. "If the memorandum," observes Parke, B., "contained only a promise to pay 6*l.* 4*s.* for goods already supplied, it would be a promissory note, and would require a stamp; but the introduction of the word ordered makes all the difference, as it shows that it is a promise to pay for goods if supplied, but which were not then delivered." (i)

(e) *Horne v. Redfearn*, 6 Sc. 260; 4 Bing. 433 s. c.

(f) *Ayrey v. Fearnside*, 4 M. & W. 168.

(g) *Bolton v. Dugdale*, 4 B. & Ad. 620; 1

N. & M. 412 s. c.

(h) *Davis v. Wilkinson*, 10 Ad. & E. 100, 104; 2 P. & D. 256 s. c.

(i) *Jarvis v. Wilkins*, 7 M. & W. 412.

STAMPS *on* AGREEMENTS. (*k*)

By 55 Geo. 3, c. 184, it is further enacted that every "AGREEMENT or memorandum, or minute of an agreement under hand only, where *the matter thereof* shall be of the value of 20*l.* or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument, together with every schedule, receipt, or other matter put or indorsed thereon, or annexed together, where the same shall not contain more than 1080 words, (being the amount of 15 common law folios,) shall have a stamp of the value of 1*l.* reduced by 7 & 8 *Vict. c. 21, to 2s. 6d.* and where the same shall contain more than 1080 words, 1*l.* 15*s.*, and for every entire quantity of 1080 words, a further progressive duty of 1*l.* 5*s.* 0*d.* (*l*) Provided always, that where divers letters shall be offered in evidence to prove an agreement between the parties who shall have written such letters, it shall be sufficient if any one of such letters shall be stamped with a duty of 1*l.* 15*s.* 0*d.*, although the same shall, in the whole, contain twice the number of 1080 words or upwards."

There is, then, an express exemption from all stamp duties in favour of a "label, slip, or memorandum, containing the heads of insurances to be made" by certain insurance companies, also of memorandums or agreements for leases at a rack rent under 5*l.*, or for the hire "of "labourers, artificers, manufacturers, or menial servants;" also of all memorandums, letters, or agreements, "made for or relating to the SALE of any GOODS, wares, or merchandize," or agreements between mariners and masters of vessels employed in coasting voyages, or "letters containing any agreement in respect of any merchandize or evidence of such agreement, which shall pass by the post between merchants or other persons carrying on trade or commerce, and residing, and actually being, at the time of sending such letters, at the distance of fifty miles from each other." (*m*) The stat. 5 & 6 W. 4, c. 19, s. 85, further exempts from stamp duty agreements for wages between masters and mariners in the merchant service.

Of the exemption from stamp duty in favour of CONTRACTS FOR THE SALE OF GOODS AND CHATTELS.

A contract under seal for the sale and purchase of goods and chattels is not exempt from the stamp duty on DEEDS. If the parties choose to

(*k*) *Eagleton v. Gutteridge*, 11 M. & W. 468.

(*l*) Figures must be counted as words *Linley v. Clarkson*, 1 C. & M. 436.

(*m*) Schedule, part i. tit. agreement. See the general exemption; also *Ante*, ch. 3, § 2. *MacKenzie v. Banks*, 5 T. R. 176.

resort to a solemn and formal contract under seal, such contract, if executory, must be stamped with a deed stamp of 1*l.* 15*s.*, and if it operates as an immediate transfer of the thing sold to the purchaser, it must have an *ad valorem* stamp before it can be given in evidence in any court of justice. (n) But all contracts and bargains in writing, signed only by the parties, are exempt from duty, provided they relate simply to the sale and purchase of goods, wares, and merchandize.

Fructus industriales, such as growing crops of turnips, potatoes, and corn, being considered, as previously mentioned, goods and chattels, are within the exemption of the statute, and contracts as to them, need not consequently be stamped to be admissible in evidence. (o) A contract for the supply of oil, or a contract with a water company for the supply of water, is a contract for "the sale of goods, wares, and merchandize" within the exemption, and does not consequently require a stamp; and it is immaterial whether the subject matter of the sale exists at the time of the making of the contract, or whether it has afterwards to be made, manufactured or provided. (p) An agreement to make a complicated machine with wheels and springs, according to a certain specification, is an agreement relating to the sale of goods within the exemption, unless the contract provides for the erection of it in a dwelling house, or upon the soil and freehold as a fixture, in which case it is a contract concerning fixtures which do not come within the exemption, either as goods, wares, or merchandizes. (q)

The act 9 Geo. 4, c. 14, which extends the provisions of the statute of frauds to contracts for the manufacture and supply of goods and materials, expressly provides that no memorandum or other writing, made necessary by that act, "shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps."

An agreement relating to the sale of goods comes within the exemption, notwithstanding the introduction into it of collateral matter. (r) An agreement to take a share in goods bought, and pay for such share at a future period, (s) or to cancel a bargain for the purchase of particular goods and make a new arrangement respecting them, (t) falls within the exemption, and so also does a warranty contained in a receipt for the

(n) 5 B. & C. 47; 7 D. & R. 807. *Phillips v. Morrison*, 12 M. & W. 740. *The King v. Ridgewell*, 9 D. & R. 680.

(o) Ante, sec. 2.

(p) *West Mid. Water. Comp. v. Suwercrop*, 4 C. & P. 89; M. M. 408 s. *Wilks v. Atkinson*, 1 Marsh 412; 6 Taunt. 211. *Ingram v. Lea*, 2 Campb. 521. *Hugh v. Breeds*, 2 C. & P. 159.

(q) *Pinner v. Arnold*, 1 Tyr. & G. 1; 2 C. M. & B. 613 s. c. *Hallen v. Runder*, 1 C. M. & B. 266. *Lee v. Risdon*, 7 Taunt. 191. Park, J., 2 Sc. 249.

(r) *Meering v. Duke*, 2 M. & B. 121. *Heron v. Granger*, 5 Esp. 219.

(s) *Venning v. Leckie*, 13 East 7.

(t) *Whitworth v. Crockett*, 2 Stark. 431.

price of a horse, (*u*) and an agreement to take a share in a horse already purchased. (*x*) If, however, the writing is introduced for the purpose of proving an agreement, independent of the contract for the sale of goods, it will not be admitted in evidence without being stamped with an agreement stamp. (*y*) And if the contract established by the writing is an entire contract for something more than a sale of goods, it does not fall within the exemption of the statute.

Thus, where a writing when produced in evidence purported to be an agreement for the sale of "two flies at 60*l.*, 5*l.* to be paid down, and the remainder of the money at three months from the above date, *harness and goodwill* included in the above agreement;" it was held that as this was an entire contract for the sale of the *goodwill* of the business as well as of the chattels specified, it could not be received in evidence without a stamp. (*z*)

So where a contract was entered into for the sale and purchase of a patent furnace, and for a license to exercise and enjoy the patent right of using such furnace, it was held that this was something more than a mere contract for the sale of goods and merchandize, and did not come within the exemption of the stamp act. (*a*) An entire contract also for work and labour and the supply of materials, and the erection of a fixture upon the soil and freehold, was held to require a stamp as amounting to something more than a contract for the sale of goods.

Guarantees for the payment of goods.—All guarantees for the payment of goods sold to a third party are within the exemption of the statute, and need not consequently be stamped to be admissible in evidence, (*b*) and so are agreements by brokers to indemnify their principals and employers against loss on the resale of goods purchased by them, (*c*) provided the primary object of the writing is a purchase or sale of goods, and the guarantee or indemnity against loss secondary and subsidiary thereto. If the primary object of the written undertaking or guarantee, however, be the obtaining of money upon a pledge of goods, it does not come within the exemption, although it may authorise the party making the advance to sell the goods when they come to hand, in satisfaction and discharge of the sum borrowed. Thus where a principal, in a letter to his factor, inclosing bills for the acceptance of the latter, promised to

(*u*) *Skrine v. Elmore*, 2 Campb. 406.

(*x*) *Marson v. Short*, 2 Sc. 243; 2 Bing. N. S. 118 s. c.

(*y*) *Forsyth v. Jarvis*, 1 Stark. 437.

(*z*) *South v. Finch*, 4 Sc. 293; 3 Bing. N. C. 506.

(*a*) *Chanter v. Dickenson*, 6 Sc. N. B. 182;

2 Dowl. N. S. 838.

(*b*) *Warrington v. Furber*, 8 East 242; 6 Esp. 89 s. c. *Watkins v. Vince*, 2 Stark. 368. *Martin v. Wright*, 9. Jurist, (8th March 1845,) 178.

(*c*) *Curry v. Edenson*, 3 T. R. 524.

provide funds for the bills, if certain goods about to be placed in the factor's hands should remain unsold at the time of the bills falling due; it was held that this letter did not come within the exemption of the stamp act, and could not be given in evidence unless it was stamped with an agreement stamp, as the primary object of the letter was the obtaining of money upon a pledge of goods, and the sale only a secondary or collateral object. (d)

Contracts relating to realty and to an interest in land.—A contract for, or relating to, the sale of realty and an interest in land, does not come within the exemption of the statutes; all bargains consequently for the purchase and sale of veins or beds of coal, or of the growing produce of an orchard, or of fruit trees, or of growing grass, or timber, or underwood, or hops, not sold with a view to its immediate severance and removal from the soil as a chattel, must be stamped as agreements, as they have been held, as previously mentioned, to be contracts for or concerning an interest in land. (e)

Fixtures are not, as has previously been shown, considered to be goods and chattels; they do not fall, therefore, within the exemption of the stamp act, and contracts for the erection of them, or for the sale and purchase of them, must be stamped in the ordinary way as agreements. (f)

Agreements "the matter whereof" is not "of the value of 20l." (g)—If the consideration for an undertaking or promise does not amount to 20l. in value, the written memorandum of such promise does not fall within the operation of the stamp acts, although the subject matter of it, or the thing to which it relates, may far exceed that value, and the breach of it may consequently give rise to a claim for damages far surpassing 20l.

A wharfinger received fifteen chests of lac dye of the value of 600l., upon the terms that he should, for the usual wharfage, ship them in a particular manner; the dye being lost and destroyed by reason of his neglect, an action was brought against him to recover damages, and a written memorandum, whereby the wharfinger acknowledged the receipt of the chests, and undertook to ship them "*four in a ship*," was tendered in evidence and objected to on the ground that the subject matter thereof, the fifteen chests of lac dye was of the value of 600l., which

(d) *Smith v. Cator*, 2 B. & Ald. 778.
(e) Ante, p. 92. *Waddington v. Bristow*,
2 B. & P. 452. *Phillips v. Morrison*, 12 East
740. *Cattell v. Gambell*, 6 Sc. 733.

(f) *Parke, J.*, 2 Sc. 249; *Parke, B.*, 2 C. M.
& B. 616; 1 C. M. & B. 275. *Chanter v.*
Dickenson, 2 Dowl. N. S. 838; 6 Sc. N. R. 182.
(g) *Remon v. Hayward*, 2 Ad. & E. 666.

amount the plaintiff sought to recover by his action, and that the memorandum consequently ought to have been stamped; but it was holden that the "matter of the agreement" within the meaning of the stamp acts, was the wharfage and charge on shipment, which the wharfinger was to receive as the consideration for his promise, and as this amounted to 7s. 6d. only! the memorandum was admissible in evidence without a stamp. (*h*)

An action was brought against a common carrier to recover damages sustained by reason of the loss of a parcel of bank notes, and the following carrier's receipt was produced, "Received of L. and Co., (the plaintiffs,) a paper parcel directed to Messrs. Hoare, Bankers, Lombard Street, value 260*l.*, which we agree to deliver to them to-morrow, fire and robbery excepted.—Carriage paid." And it was urged that the "matter of the contract," within the meaning of the stamp laws, was the price of the carriage which was below 20*l.*, and not the value of the parcel, and Lord Tenterden, after some doubt and hesitation, admitted the paper in evidence upon the authority of the previous case. (*i*)

Upon the same principle it has been holden in the case of agreements for leases, that the value of the "matter of the agreement" is not the value of the land nor the value of the occupation, but the amount of *rent* reserved and agreed to be paid, that the rent is what the parties deal for, and the amount of stamp duty must be regulated by that and not by the value of the property. (*k*) So also in the case of an agreement to confess a judgment for 50*l.* to secure a debt and costs of smaller amount, it has been held that the value of "the matter of the agreement" is not the amount of the judgment, but the debt and costs to be recovered. (*l*)

Contracts of uncertain value.—Neither is a stamp necessary if the value is altogether uncertain, and not measurable by a pecuniary standard. A contract of marriage, for example, is not within the meaning of the act, "because the value of the contract is not measureable." (*m*)

Indorsements and references to other documents.—The words "together with every schedule, (*n*) receipt, or other matter put or indorsed thereon or annexed thereto," do not extend to a detached independent contract, referred to and incorporated in another contract. Thus where an agreement had been entered into and duly stamped, containing a special clause for referring disputes to arbitration, and subsequently a

(*h*) *Chadwick v. Sills*, B. & M. 15.

(*i*) *Latham v. Rutley*, B. & M. 13.

(*k*) *Doe v. Wiggins*, 4 Ad. & E. N. S. 367.

Doe v. Amos, 2 M. & R. 180.

(*l*) *Ames v. Hill*, 2 B. & P. 150.

(*m*) *Bayley, J., Orford v. Cole*, 2 Stark. 353.

Cox v. Bailey, 6 M. & Gr. 195.

(*n*) *Lake v. Ashwell*, 3 East, 326.

second agreement was entered into, in which it was provided and declared that the provision for reference to arbitration contained in the first agreement, should extend to the second agreement, "and to every clause therein contained, in the same manner as if such or the like provision for reference to arbitration, and such or the like agreement for carrying the same into effect, and for obeying and observing the award made in pursuance thereof, had been therein repeated;" and it was held that the clause referred to could not be considered as "annexed" to the new agreement so as to make an increased stamp necessary, and that a stamp adapted to the number of words actually written in the second agreement, without counting the clause referred to, was sufficient. (o) But the contract or clause referred to must, of course, itself be stamped before it can be read in evidence. (p)

Neither do the words "put or indorsed thereon," extend to an indorsement which forms no part of the contract. A mere indorsement, for example, of the names of the executing parties and of the date of the instrument need not be taken into account in calculating the number of words, with a view to the progressive stamp duty, as such indorsement does not in any way control or affect the operation or construction of the contract. "You might as well say that an envelope, on which the names of the parties and date were written, was part of the deed, and therefore required an additional stamp." (q)

Letters and detached writings and memoranda.—The words of the act providing that where divers letters shall be offered in evidence to prove an agreement, it shall be sufficient if any one of such letters shall be stamped with a 1*l.* 15*s.* stamp, is not confined to letters or agreements between the same parties, or to a correspondence between two parties only. If the letters and documents contain references to each other, or refer to the same subject matter, and together form only one agreement, it is sufficient if any one of such letters, by whomsoever written, is stamped with the 1*l.* 15*s.* stamp. (r) But if the letters and documents do not refer to each other, or to the same subject matter, so as to form on the face of them, when placed in juxta position, one entire transaction and one contract, they cannot be given in evidence under one stamp, for there must in general be distinct stamps for each distinct contract or transaction. (s)

(o) *Attwood v. Small*, 1 M. & R. 246; 7 B. & C. 390; 3 C. & P. 208 s. c. *Sneezum v. Marshall*, 7 M. & W. 417.

(p) *Turner v. Power*, 7 B. & C. 625. *Wallis v. Robinson*, 4 Ad. & E. 877.

(q) *Littledale, J., Windler v. Fearon*, 7 D. &

R. 187; 4 B. & C. 663, s. c.

(r) *Smith v. Crana*, 8 Moore, 8. *Heming v. Perry*, 2 M. & P. 375. *Peate v. Dicken*, 1 C. M. & R. 425. *Drant v. Brown*, 5 D. & R. 584; 3 B. & C. 665, s. c.

(s) *Richards v. Franco*, *Chitty's Stamp Law*,

Printed papers and advertisements in newspapers are not, of course, admissible in evidence for the purpose of proving and establishing an agreement without being stamped with an agreement stamp, any more than written documents. (t)

STAMPS on AGREEMENTS *operating as* ACQUITTANCES and DISCHARGES
of SIMPLE CONTRACT DEBTS and DEMANDS.

It is further enacted by the stamp acts, that any note, memorandum, or writing whatsoever, given to any person for or upon the payment of money, which shall contain, or express, or in any manner signify or denote any acknowledgment of any debt, account, claim, or demand, being paid, settled, received, accounted for, balanced, discharged, released, or satisfied . . . shall be deemed and taken to be a receipt for money within the meaning of the act, and be charged with the stamp duty accordingly. (u)

Two written memorandums, one of them being stamped with an agreement stamp, were offered in evidence to establish an agreement, to the following effect: "Mr. T. W. Marriott having discharged the five quarters' rent of my house, amounting to 72*l.* 3*s.* 9*d.*, I have written off the said sum from his mortgage deed, and will write a receipt on his mortgage deed.—*R. S. Jones.*" "Mr. Jones having written off the sum of 72*l.* 3*s.* 9*d.*, from his mortgage debt, being five quarters' rent of his house, I hereby discharge this same rent to this 24th day of June, 1841.—*T. W. Marriott.*" And it was held, that as these letters amounted to an acquittance and discharge of a debt, they could not be given in evidence under an agreement stamp, but ought to have been stamped as a receipt at the time they were signed, or within one month afterwards, on payment of the penalty pursuant to the act. (x)

Bare ADMISSIONS and ACKNOWLEDGMENTS *not operating as a discharge of a debt or claim, nor amounting to* EVIDENCE OF A CONTRACT.

But a written memorandum or acknowledgment of the *receipt of money*, or of bills, or chattels, or securities, by way of *deposit*, does not require a receipt stamp, as it is not given in evidence in *discharge of a debt*, neither does it require an agreement stamp, as it is a bare admission of a fact, and not "evidence of a contract" within the meaning of the stamp acts, "Which ought," observes Tenterden, C. J., "so to be construed

28 (s), 24 (g), ed. 1841; 1 Phil. ev. 490; Rosc. ev. 465; post, p. 138. *Firbank v. Bell*, 1 B. & Ald. 36. *Atherstone v. Bostock*, 2 Sc. N. R. 637.

(t) *May v. Smith*, 1 Esp. 283.

(u) *Wright v. Shawcross*, 2 B. & Ald. 501, n. (a). *Jacob v. Lindsay*, 1 East, 460.

(x) *Lucas v. Jones*, 13 Law, J., N. S. (Q. B.) 208. *Watkins v. Hewlett*, 3 Moore, 211.

as not to make any instrument liable to them, unless manifestly within the intention of the legislature." (y)

A plaintiff in support of an action brought for money had and received, tendered in evidence a memorandum in the handwriting of the defendant, in the terms following: "Sept. 15th, 1824,—Mr. Tomkins (the plaintiff) has left in my hands 200*l*."

This paper was objected to on the ground that it ought to have had a receipt stamp, as it was offered as evidence of a receipt of money, but the court held, that the words of the stamp acts, "every receipt or discharge given for or upon the payment of money," clearly applied to writings given as a discharge of money antecedently due, and not to an acknowledgment that money had been deposited to be accounted for on demand, and that no stamp at all was necessary to render such an admission or acknowledgment admissible in evidence. (z)

In an action for money had and received, brought to recover the sum of 35*l*., paid to the defendant as overseer of the poor, for the support of a bastard child, which died a few days after its birth, the following writing, signed by the defendant and stamped as a receipt, was produced to establish the fact of the payment of the money sought to be recovered back: "Received, 1st July, &c., of Mr. Watkins (the plaintiff) the sum of 35*l*., by a bill of exchange, payable at two months after date, which when paid will exonerate him from the expenses attending the birth of an illegitimate child to which he is now chargeable;" and it was held, that this document might be produced in evidence without an *agreement* stamp. (a) Neither was a receipt stamp, it should seem, necessary to its admissibility as a simple acknowledgment of the fact of the payment, as that fact was not set up in discharge, but in support of the action. (b)

An I O U, being a simple acknowledgment of a debt, need not be stamped. (c) The defendant, having borrowed money of a Mrs. Melanotte, gave her the following memorandum: "1830, Nov. 1.—I O U forty-five pounds thirteen shillings, which I borrowed of Mrs. Melanotte; and to pay her five per cent. till paid." And it was held, that this document did not require a stamp, either as a promissory note or an agreement; it was not a promissory note, as there were no words importing a promise to pay, and no time limited for payment, and, if the latter part of the note could be considered as an agreement to pay interest, yet, inasmuch as

(y) 9 D. & R. 545; 6 B. & C. 542; Ellenborough, C. J., 8 East, 245; 1 M. & W. 441.

(z) *Tomkins v. Ashby*, 9 D. & R. 543; 6 B. & C. 543, *n. c.*

(a) *Watkins v. Hewlett*, 3 Moore, 211.

(b) *Jacob v. Lindsay*, 1 East, 460. *Wellard v. Moss*, 7 Moore, 563. See however *Hawkins v. Warre*, 5 D. & R. 519.

(c) *Fisher v. Leslie*, 1 Esp. 426. *Israel v. Israel*, 1 Campb. 499.

such interest did not amount to 20*l.*, it could not be an agreement requiring a stamp within the act. (*d*)

A simple acknowledgment in the following form does not require a stamp: "Mr. Huxley has advanced me 12*l.* on furniture, &c., delivered to him at Stratford." Nor does a cognovit in an action require to be stamped, if it is a simple admission or acknowledgment, and contains no words or terms of agreement. (*e*) But if any terms or conditions be added thereto, for the payment of money by instalments or otherwise, it immediately becomes an agreement within the provisions of the statute. (*f*) If to an I O U for 40*l.* be added the words "to be paid on the 22nd instant," the words import a promise, and the instrument must be stamped as a promissory note. (*g*)

In an action of assumpsit against an attorney for the breach of an undertaking to recover the amount of a bill deposited with him or to re-deliver the same to the plaintiff, the latter produced the following letter, addressed to him by the defendant: "I have this day received a bill of exchange for 800*l.*, drawn, &c., which I hold as your attorney to recover the value from the respective parties, or to make such other arrangement for your benefit as may appear to me in my professional capacity, reasonable and proper." And it was held, that this letter, being a mere acknowledgment of a duty which the party took upon himself to perform, was not "evidence of a contract" within the meaning of the stamp acts. (*h*) So, where an action was brought for a breach of promise to discount or return bills, deposited the following unstamped memorandum, signed by the defendant, was held to be admissible in evidence: "I have in my hands three bills, which I have to get discounted or return on demand." (*i*)

In an action for the breach of a promise to re-deliver on request a quantity of wine, which had been placed in the defendant's care, the following unstamped memorandum was likewise held admissible in evidence: "This is to certify that Mr. M'Naughtan (the defendant) has in his cellar, belonging to Mr. Hartley, that is paid for, eight dozen and a half of port wine, bottled, &c.; one dozen bucellas, twelve dozen port, &c. &c."

"March 5th, 1823.—Received from Mrs. Hartley five bottles port, eight bottles bucellas, &c., making in the whole twenty dozen, and eleven bottles of port, &c. &c."

(*d*) *Melanotte v. Teasdale*, 13 Law, J., N. S. (Excheq.) 358.

(*e*) *Huxley v. O'Connor*, 8 C. & P. 204.

(*f*) *Ames v. Hill*, 2 B. & P. 150. *Reardon v. Swaby*, 4 East, 188. *Bray v. Manson*, 8 M. & W. 668.

(*g*) *Brooks v. Elkins*, 2 M. & W. 74.

(*h*) *Langdon v. Wilson*, 7 B. & C. 640, n. (b).

(*i*) *Mullett v. Huchison*, ib. 639. *Barry v. Goodman*, 2 M. & W. 769.

"At the last settlement of the empty bottle account, there remained due to Mr. M'Naughtan, &c. &c. All the above wine paid for." (*k*)

In an action of trespass for turning the plaintiff out of his house, the defendant pleaded *liberum tenementum*, by way of justification, and, in order to show that the plaintiff had been permitted to reside in the house upon sufferance only, he produced the following unstamped memorandum, signed by the plaintiff: "I, David Barry, (the plaintiff,) hereby certify that I remain in the house, &c., upon sufferance only, and agree to give immediate possession to the said Wm. Goodman (the defendant) at any time he may require." And it was held, that a stamp was not requisite to render it admissible. "This was a mere admission," observes Lord Abinger, "that the house was the house of Goodman, (the defendant,) and that he the plaintiff had no interest whatever in it. As to the agreement to give it up, that followed as a matter of course; no stipulation to give it up was necessary." (*l*)

A draft agreement, having on the back of it, "we approve of this draft," signed by the plaintiff and defendant, was admitted in evidence, not for the purpose of authenticating and establishing the agreement therein referred to, but for a collateral purpose, to show, by the admission of the parties, that certain things were contemplated and intended to be done; (*m*) and a letter stating that "F. must be satisfied with his present salary, until I know what turn the season takes," was held not to require a stamp, as it was no agreement, but "a mere admission made by the defendant to a third person, that the plaintiff (F.) was in his the defendant's service." (*n*)

Any mere admission, indeed, or acknowledgment in writing, amounting simply to a link in the chain of evidence by which a contract or agreement is sought to be established, or an action maintained, may be given in evidence without any stamp, such as a broker's sale note containing an account of the sale and purchase of shares, (*o*) or an advertisement in a newspaper, intended to establish the simple fact of a dissolution of partnership, (*p*) or a schoolmaster's printed prospectus of the terms upon which he provides board and instruction for his pupils, or a landlord's written or printed particulars of the terms upon which he lets his

(*k*) *Blackwell v. M'Naughtan*, 1 Ad. & E. N.S. 27.

(*l*) *Barry v. Goodman*, 2 M. & W. 769.

(*m*) *Doe v. Pedgriph*, 4 C. & P. 312. *For-
syth v. Jervis*, 1 Stark. 437. *Rex v. Pooley*, 3

B. & P. 316.

(*n*) *Frazer v. Bunn*, 8 C. & P. 704.

(*o*) *Joseph v. Pebrer*, 1 C. & P. 341. *Tom-*

kins v. Savory, 9 B. & C. 704.

(*p*) *Jenkins v. Blizard*, 1 Stark. 418.

lands, (q) or a builder's or artificer's estimate of the cost of certain work, or his written offer or proposal to do work upon certain terms. (r)

Bare LICENCES and AUTHORITIES not amounting in themselves to EVIDENCE OF A CONTRACT.

A mere license or authority also may be given in evidence without a stamp. If one man, for example, authorises another to discharge a debt or pay money upon his account, or to sell goods upon certain terms, the written authority or direction to pay may be given in evidence unstamped. (s) A landlord gave to his tenant the following written memorandum: "I shall be happy to allow Mr. Blencowe to leave the apartments without notice, if he finds anything which may at all lead him to suspect that there is any embarrassment in his landlord;" and it was held, that this paper was not of itself evidence of a contract within the meaning of the statute. (t)

The plaintiff, having distrained the goods of the defendant, his tenant, withdrew from possession on receiving from such tenant the following written memorandum: "Sir,—In consideration of your withdrawing at my request the distraint upon the premises I hold of you, situate, &c., for one year's rent due, &c., at the rate of 44*l.* per annum, and giving time for the payment of the said rent, which I hereby admit and acknowledge to be justly due and payable unto you, until the first day of February next, I do hereby authorize and empower you, on default being made by me in such payment at the time aforesaid, to re-enter upon the said premises, and there distrain for the said rent or any lesser sum thereof, as may then be in arrear, notwithstanding the withdrawal of the said distraint now made by you; and I do hereby declare your now withdrawing the present distraint shall in no ways abridge or prevent your again distraining, &c.;" and it was held, that this document was a mere license or authority from the tenant to the landlord, and did not amount to an agreement, or minute, or memorandum of agreement within the stamp act. (u)

A minute of a resolution of a company or an association, entered

(q) *Edgar v. Blick*, 1 Stark. 464. *Ramsbottom v. Tunbridge*, 2 M. & S. 434. *Hawkins v. Warre*, 5 D. & R. 520. *The King v. St. Martin, Leicester*, 2 Ad. & E. 215; 4 N. & M. 207, s. c. *Lord Bolton v. Tomlin*, 5 Ad. & E. 862, 863; 1 N. & P. 247, s. c.

(r) *Pennifoot v. Hamilton*, 2 Stark. 475. *The King v. Wrangle*, 2 Ad. & E. 515.

(s) *Walker v. Rostrom*, 9 M. & W. 412. *Parker v. Dubois*, 1 M. & W. 30. *Ames v. Hill*, 2 B. & P. 150. *Hill v. Johnson*, 3 C. & P. 456. *Humphrey v. Brient*, 4 C. & P. 157.

(t) *Bethell v. Blencowe*, 3 Sc. N. R. 568—573.

(u) *Hill v. Ramm*, 6 Sc. N. R. 571.

in the books of such company, authorizing the appointment of a clerk, and fixing the amount of salary he is to receive, or authorizing the acceptance of a tender for work to be done for the company upon certain terms, and at a certain rate of remuneration, is not an agreement, or a minute, or memorandum of an agreement, requiring a stamp within the meaning of the stamp act. (x)

An action being brought for board and lodging supplied by the plaintiff to an illegitimate child of the defendant, several letters from the latter to the former, containing promises to remit money to the plaintiff, and making different excuses for not having done so, were offered in evidence, and held to be admissible without a stamp, to show that the board and lodging had been provided by the plaintiff, by the authority and at the request of the defendant. (y)

But if the contract is executory, and there is no other evidence of it, but what is afforded by the written memorandum, then such memorandum is, in point of fact, "evidence of the contract," within the meaning of the act, and must be stamped as an agreement. (z)

A schoolmaster brought an action against a parent for removing a child from school without giving three months' notice of his intention so to do, and, in support of this action, a printed prospectus was produced, a copy of which had been delivered by the plaintiff to the defendant at the time that the latter had agreed to place the child under the plaintiff's care. By this prospectus it was stipulated, that unless three guineas were paid as entrance money on the entrance of a pupil, three months' notice of removal was to be given, and in default thereof, that the plaintiff was to be paid for the whole year, and it was held, that the paper could not be given in evidence to establish such a contract, without being stamped with an agreement stamp. (a) In this case, the plaintiff, in the first instance, produced a printed copy of the prospectus, duly stamped, which was objected to on the ground that it was not the identical prospectus which had been delivered to the defendant. A notice was then proved on the part of the plaintiff to the defendant, to produce the copy actually delivered to him, and the defendant having produced this copy, it was tendered in evidence by the plaintiff and objected to, and the court held, that it could not be received and read, as it was unstamped.

In action for the use and occupation of landed property, it appeared that the defendant had originally held the premises in respect of which the

(x) *Vaughton v. Brine*, 1 Sc. N. R. 258; 1 M. & G. 559, s. c. *Lucas v. Beach*, ib. 350.

(y) *Beeching v. Westbrook*, 8 M. & W. 411.

(z) *Bowen v. Fox*, 2 M. & R. 167. *Rams-*

bottom v. Mortley, 2 M. & S. 445. *Nicholson v. Smith*, 3 Stark. 128.

(a) *Williams v. Stoughton*, 2 Stark. 292.

action was brought, under a lease granted by his father, against whom a sequestration issued out of Chancery: that the plaintiffs had been appointed sequestrators, and that the defendant had thereupon signed the following written document:—"I do hereby attorn and become tenant of a certain estate, &c. to J. C. and F. A., (the plaintiffs,) two of the sequestrators named in a certain writ of sequestration, &c., to hold the same for such time, and on such conditions, as may be subsequently agreed upon between me and the sequestrators aforesaid;" and it was held that this document, if it amounted to anything, and could have any effect at all under the circumstances, was evidence of an agreement to become tenant to the plaintiffs, and required consequently an agreement stamp to be admissible in evidence. (b) But a mere attornment in writing to the *lawful owner* does not in general require a stamp, it may be given in evidence unstamped to establish the simple fact of the attornment. (c)

Several contracts or agreements upon one sheet of paper.

If there be several distinct contracts founded upon separate and distinct considerations, each of the value of 20*l.*, upon one piece of paper, each contract must be stamped with an agreement stamp.

If several distinct leases, or agreements for leases for example, are written upon one sheet of paper, each lease and agreement must have a lease and agreement stamp. (d) If two persons by agreement in writing lay a wager, and then by a subsequent agreement indorsed on the first, consent that the bet shall be doubled, there must be two agreement stamps, for they are separate and distinct transactions. (e) So, if a contract has been entered into to be fulfilled by a particular day, and after the making of the agreement, but before the day for its completion arrives, the parties, by an indorsement on the former agreement, agree to enlarge the time for the completion of the contract, this is a fresh agreement ingrafted upon the original contract, and must have a fresh stamp, if the subject matter thereof is of the value of 20*l.* (f)

But there may be a variety of stipulations and engagements entered into at the same time by divers parties, forming the several parts of one contract, together constituting one transaction, and requiring consequently but one stamp. (g) "When a debtor compounds with his creditors, and

(b) *Cornish v. Searell*, 8 B. & C. 474, 475.

(c) *Doe dem. Linsey v. Edwards*, 5 Ad. & E. 95; 6 N. & M. 633, s. c.

(d) *Doe d. Copley v. Day*, 13 East, 246. *The King v. Reeks*, Str. 716; Raym. 1446.

(e) *Robson v. Hall*, 1 Peake, 173, per Lord Kenyon.

(f) *Bacon v. Simpson*, 3 M. & W. 78, 88. *Stephens v. Lowe*, 2 M. & Sc. 44, 52; 9 Bing. 32, s. c. *Schumann v. Weatherhead*, 1 East, 537.

(g) *The King v. Louth*, 8 B. & C. 247. *Stead v. Liddard*, 8 Moore, 2; 1 Bing. 196, s. c.

each creditor executes the same deed, covenanting either to give further day of payment, or to take a certain sum as a composition, every covenant is in fact a separate covenant, and the several deed of each creditor who signs the deed, but the whole being one transaction, a separate stamp is never required." (h) An agreement by several persons to subscribe to one common fund, or to do certain things in furtherance of one common purpose, requires but one stamp, although the parties may have several interests, and subject themselves to separate liabilities. (i) The members of a mutual insurance club all executed the same power of attorney, severally authorizing the persons therein named to sign the club policies for them; and it was held that this was one transaction, and that the instrument required but one stamp. (k)

There may be also divers subject matters, and but one contract or agreement as to all. (l) If two separate estates, for example, are demised at separate and distinct rents by one and the same deed, there are not two distinct leases, nor two separate and distinct contracts; the lessee probably would never have taken the one estate without the other, the letting constitutes one transaction and one contract, and one *ad valorem* stamp on the aggregate amount of the rent is sufficient. (m)

If there are two distinct agreements on one sheet of paper, and only one stamp, and it is doubtful to which agreement the stamp was intended to apply, neither of the agreements can be admitted in evidence under it. (n) If, however, the stamp is placed opposite the contract sought to be enforced, and the operation of the one agreement is not controlled or affected by the other, the stamp is *prima facie* sufficient. (o)

Effect of subsequent endorsements and memorandums altering the terms of the original contract.—If after a contract has been entered into and executed, the parties vary the terms thereof, either by an alteration in the body of the written instrument, or by an indorsement, qualifying and restricting, or extending its operation, and neglect to have the writing restamped, they will be unable to recover upon either contract. If the first agreement is altered and turned into another and different agreement, and the plaintiff brings his action thereon, and then finds that the substituted contract cannot be enforced by reason of its being unstamped, he

(h) Mansfield, C. J., *Bowen v. Ashley*, 4 B. & P. (1 N. C.) 278. *Anandale v. Pattison*, 9 B. & C. 919. *Ramsbottom v. Davis*, 4 M. & W. 584; 7 Dowl. 173, n.c.

(i) *Baker v. Jardine*, 18 East, 235, n. (a.) *Davis v. Williams*, ib. 13. *Goodson v. Forbes*, 6 Taunt. 171.

(k) *Allen v. Morrison*, 8 B. & C. 565.

(l) Alderson, B., 12 M. & W. 38. *Shipton v. Thornton*, 9 Ad. & E. 331. *Doe v. Fereday*, 12 Ad. & E. 27.

(m) *Boase v. Jackson*, 6 Moore, 480. *Blount v. Peerman*, 1 Sc. 55; 1 Bing. n. s. 408.

(n) *Tindal, C. J.*, 9 Ad. & E. 31.

(o) *Waddington v. Francis*, 5 Esp. 181. *Evans v. Pratt*, 4 Sc. N. R. 370, 381.

cannot resort back to the contract which was abandoned by consent, and seek to recover upon it in its original state. (*p*)

If a bill of exchange or a promissory note is altered in any material particular, it becomes a new security, and must be restamped. (*q*) But if there is a mere addition, not in any way restricting or qualifying the original liability, the written instrument is not avoided and rendered nugatory by the alteration. (*r*) But whilst a contract is *in fieri*, and before it is completely executed by all parties, and perfected, an alteration may be made without rendering a new stamp necessary. (*s*) Before a promissory note has been negotiated, it may be converted into a bill of exchange, or altered as to its date, or the time that it has to run, in furtherance of the original intention of all parties, and to correct a mistake. (*t*) And a subsequent alteration of a written agreement in a point not material, made by consent of all parties, does not render a fresh stamp necessary, such as an alteration made for the mere purpose of adding the words "or order" on a bill of exchange, which had been accidentally omitted; (*u*) or altering the name of the port from whence the certificate of a ship's registry was granted, a wrong port having been inserted by mistake; (*x*) or rectifying a clerical error in the name, in declaring the interest on a policy. (*y*)

Of stamping contracts after their execution.—DEEDS may be stamped at any time before they are produced in evidence, on the payment of a penalty of 5*l.*; and all simple contracts and agreements, containing more than 1080 words, or fifteen common law folios, may be stamped within twenty-one days after execution, without the payment of any penalty at all; but if the parties neglect to stamp them within that period, they are chargeable with the 5*l.* penalty. (*z*) And as regards agreements not containing more than 1,080 words, it is enacted, by 7 & 8 *Vict. c. 21, sec. 5*, that such agreements may be stamped within fourteen days of the making thereof, without the payment of any penalty; but if they are not stamped within that period, a penalty of 10*l.* must be paid on the stamping thereof. The court will not, how-

(*p*) *French v. Patton*, 9 East, 356. *Reed v. Deere*, 7 B. & C. 265. *Sweeting v. Halse*, 9 B. & C. 369; 4 M. & R. 289, s.c.

(*q*) *Knill v. Williams*, 10 East, 431. *Bathe v. Taylor*, 15 East, 416.

(*r*) *Catton v. Simpson*, 8 Ad. & E. 136.

(*s*) *Jones v. Jones*, 1 C. & M. 721. *Hall v. Chandless*, 12 Moore, 316. *Spicer v. Burgess*, 1 C. M. & R. 129.

(*t*) *Webber v. Maddox*, 3 Campb. 1. *Kennerley v. Nash*, 1 Stark. 452. *Sherrington v.*

Jermyn, 3 C. & P. 374. *Downes v. Richardson*, 5 B. & Ald. 674.

(*u*) *Kershaw v. Cox*, 3 Esp. 246, cited 10 East, 435; 15 East, 417.

(*x*) *Cole v. Parkin*, 12 East, 471.

(*y*) *Robinson v. Touray*, 1 M. & S. 217. *Sawtell v. Loudon*, 5 Taunt. 359.

(*z*) 23 Geo. 3, c. 58, s. 5. *Bouffield v. Godfrey*, 5 Bing. 418. *Chitty on Stamps*, by *Hulme*, p. 49, ed. 1841.

ever, if the contract is produced duly stamped, inquire when the stamp was affixed, or whether the proper penalty has been paid. (a)

Receipts may be stamped within fourteen days after they have been given, or bear date, on payment of the duty and a penalty of 10*l*.

By 55 *Geo. 3, c. 184, s. 10*, it is enacted, that all instruments having wrong stamps, but of sufficient value, shall be valid, and require neither restamping nor payment of further duty or penalty, except in cases where the stamp or stamps used on such instrument shall have been specially appropriated to any other instrument, by having its name on the face thereof, as in the case of receipt stamps. When a stamp, wrong upon the face of it, has been used, the correction of the mistake is regulated and provided for, in the case of bills and notes, by 37 *Geo. 3, c. 136, s. 5*, which enacts, that a bill or note, stamped with a stamp of equal or superior value to that which it ought to have had, but with a wrong denomination on the face of it, may be properly stamped on payment of a penalty; but if such stamp be of inferior value, the defect cannot be remedied. The commissioners of stamps have no authority to impose the proper stamp in the last case, and no stamp that they can affix will render the instrument admissible in evidence. (b) But all contracts and agreements which have been stamped with stamps of less than the legal amount, may be duly stamped at any time before they are given in evidence, on payment of the duty and the penalty, as in the case of unstamped instruments.

If an unstamped contract is brought within sixty days, or a contract stamped with a wrong stamp is brought within one year after execution to be stamped, the commissioners may remit the penalty. (c)

If it appears at a trial on the plaintiff's own showing, or from the cross-examination of the plaintiff's witness, that the cause of action grows out of a written contract, the writing must be produced, and if it is not duly stamped the plaintiff will be nonsuited. (d) But if the plaintiff can get through his case without showing, or being compelled to disclose by cross-examination, that there is a written agreement, he cannot be nonsuited by the defendant's producing an unstamped written contract relating to the subject matter of the action; (e) nor is the defendant ever permitted to produce an unstamped contract for the purpose of qualifying or defeating a case established by the plaintiff.

(a) *The King v. Preston*, 5 B. & C. 1028.

(b) *Green v. Davies*, 4 B. & C. 235; 6 D. & R. 306, s. c.

(c) 37 *Geo. 3, c. 136, sec. 3*; 44 *Geo. 3, c. 98, s. 24*.

(d) *Brewer v. Palmer*, 3 Esp. 213. *Hodges*

v. Drakeford, 5 B. & P. 273. *Fenn v. Griffiths*, 4 M. & P. 299; 6 Bing. 533, s. c. *Buxton v. Cornish*, 12 M. & W. 426; 13 Law, J., n. s., Excheq. 91.

(e) *Fielder v. Ray*, 3 M. & P. 659; 6 Bing. 332, s. c.; 2 Sc. N. R. 64.

An action was brought against the defendant for neglecting to occupy and pay rent for certain apartments which he had agreed to hire of the plaintiff. In support of this action, the plaintiff produced in evidence a letter from the defendant, agreeing to take the apartments, stamped with an agreement stamp; and also the copy of a letter addressed to the defendant by the plaintiff, in which the latter agreed to let him the rooms. The letter and copy having been read, the defendant attempted to show that the contract had been varied and altered by other letters of the same date; and attempted to put in an unstamped letter, addressed to him by the plaintiff on the 25th of February, which he alleged to be a continuation of the first letter, and part of the same transaction; but it was held, that if the agreement was to be collected from the two letters, the first letter ought to have been stamped with a 1*l.* 15*s.* stamp, to render the second admissible; and as it was stamped with a 1*l.* agreement stamp only, and the letter produced by the defendant was not stamped at all, such second letter could not be admitted in evidence. (*f*)

An unstamped writing cannot be given in evidence for the purpose of being "made good, useful, or available in law; (*g*) but it may be introduced for the purpose of showing that it is a mere piece of waste paper, from the very circumstance of its being unstamped, or for the purpose of serving some collateral purpose. A forged bill, for example, may be given in evidence as a proof of forgery or larceny, or bribery at an election, to support an action of debt for the penalty, or to prove usury, or to show that a transaction is void and illegal, as the object of its introduction in evidence is not in such cases to set it up and establish it as a binding contract, but rather to destroy it as such. (*h*)

(*f*) *Atherstone v. Bostock*, 2 Sc. N. R. 642. (*h*) *Smart v. Nokes*, 7 Sc. N. R. 786, 794;
 (*g*) *Williams v. Gerry*, 10 M. & W. 296; 2 2 T. R. 606, n.; 1 Leach, C. C. 392; 4 M. &
 Dowl. n. s. 209; 9 B. & C. 375; 4 M. & R. W. 361.
 287.

CHAPTER V.

OF THE LEGAL FORCE AND EFFECT, AND OF THE INTERPRETATION, OF DEEDS AND SIMPLE CONTRACTS.

SECTION I.—*Deeds*—Estoppel by deed confined to the parties to the contract—When the averment of a fact by one party may be shown to be false by the other—Parol evidence of fraud or illegality to defeat an action upon a deed—Of the interpretation of deeds—Of the ordinary rules of interpretation—The general intention is to prevail over the particular expression—Transposition of words and clauses to give effect to the general intention—Parol evidence to explain the meaning of doubtful words and terms of art—Interpretation in connexion with surrounding circumstances—Latent ambiguity—Patent ambiguity of intention, and the inadmissibility of parol evidence to cure it—Of inferences to effectuate an obvious intention, and sustain the contract—Customary rights impliedly annexed to the subject matter of the contract—Parol evidence of such customary rights—Exclusion of the custom by express stipulation—Influence of custom upon the meaning and interpretation of words—Of covenants—Grants—Bonds and obligations.

SECTION II.—*Simple contracts*—Inadmissibility of oral evidence to add to or alter a contract in writing—When admissible in aid of insufficient written evidence of a contract, or to show a subsequent release and discharge from liability—Simple contracts governed by the same rules of interpretation as deeds—Agreements for leases—Warranties—Continuing guarantees—Wagers.

SECTION III.—*Of penalties and liquidated damages*—Penal obligations—Relief from penalties on money bonds in equity, and also at common law—Relief by the statute of Anne—Relief from penalties for the non-performance of covenants and agreements in equity, and by stat. Wm. 3—*Liquidated damages*—Agreement for the payment of a sum in solido as the ascertained and settled damage—When the sum named is a *penalty*, and when it may be recovered as the *liquidated damage*.

SECTION I.

OF THE LEGAL FORCE AND EFFECT, AND OF THE INTERPRETATION OF DEEDS.

Deeds.—No mere written agreement or oral stipulation entered into between the parties to a deed at the time of the making and execution

thereof, can be given in evidence to control, or qualify, or enlarge, or in any way affect the express terms of the contract, such, for example, as that an annuity deed was to be subject to redemption, or that the time for the performance of the contract was to be enlarged; nor can the operation of a deed be restricted, or the liability created by it be lessened or discharged, by any subsequent contract or agreement in writing not under seal. (a) "No rule of law is better established than this, that a contract under seal can only be discharged by an instrument of equal force and validity—" *Quodque dissolvitur eodem ligamine quo ligatum est.* (b)

A tenant covenanted in an indenture of demise under seal, to yield up at the expiration of his term all erections and improvements that should during the term be erected and made upon the premises. About twenty years after the granting of the lease, the tenant offered to erect a greenhouse and conservatory, provided the landlord would permit him to remove it at the expiration of the term; the landlord, by letter, promised so to do, and the greenhouse was built. The landlord died, the term expired, and the tenant removed the greenhouse; whereupon an action was brought against him by the landlord's executor upon the covenant, and it was held that the parol license could not operate as a discharge of the covenant, and that the tenant was responsible for the breach thereof. (c)

Estoppel by deed confined to the parties to the contract.—The rule of law which prevents a party from disputing or contradicting what he has affirmed or declared by deed, does not extend to strangers to the contract. Where the public, or third persons for example, have an interest in the real nature of a transaction under seal between two or more parties, they are not bound by the representations and averments of those parties, but may impeach them, and contradict them by parol or oral testimony. Thus, where a deed of conveyance expressed 28*l.* to be the purchase money for an estate, it was held that it was competent to one of two contending parties to show that the real consideration was 30*l.*, in order to establish a settlement under the statute. (d) A party to a deed, moreover, is not estopped in an action by another party not founded on the deed, and wholly collateral to it, from disputing the truth of certain facts recited and set forth in such deed. (e) And as between the parties themselves any averment of a fact made by one of the parties in the nature of a warranty to the other, may be contradicted and shown to be false by that other. If

(a) 1 H. Bl. 689; 1 Br. C. C. 92; 1 B. & C. 704; 3 T. R. 590; 12 Ad. & E. 442; 4 P. & D. 270, s. c.; 1 Ves. jun. 241; 2 Sc. N. R. 41; Ib. 466.

(b) Tindal, C. J., 3 Sc. N. R. 215.

(c) *West v. Blakeway*, 3 Sc. N. R. 199.

(d) *Rez v. Scammonden*, 3 T. R. 474; Vin. Abr. Estoppel Z. 481.

(e) *Carpenter v. Buller*, 8 M. & W. 209.

a deed of assignment, for example, recites that the assignor is possessed of some estate or interest, such as a lease, or a patent right, and then proceeds to assign such estate or interest, and the assignee, in consideration of the assignment, enters into certain covenants upon which an action is brought, the assignee is not estopped from showing that the recital was false, and that no such estate or interest was vested in the assignor, and transferred by virtue of the deed. (*f*) But the assignor himself, who makes the averment, would not be permitted to contradict or dispute the fact recited. (*g*)

Parol evidence of fraud or illegality may be given for the purpose of showing that the plaintiff ought not to have the assistance of a court of law for the enforcement of the contract. "If duress be pleaded, or a false reading of the deed, you avoid the deed at law by parol evidence, but then these facts are collateral to the import of the instrument, they are *dehors* the contract; they do not vary or alter it." (*h*) If the deed be made and executed in furtherance of immorality and vice, seduction or fornication; if it contravenes the general policy of the law, or the provisions of an act of parliament, or the bankrupt and insolvent laws; if it tends to injure the public service, or operates in restraint of trade or marriage, the courts of law will decline to give their assistance for its enforcement, and the contract consequently remains a dead letter, and is said to have no legal existence or power. If the defect appears upon the face of the deed, it is at once fatal to an action upon the instrument; and if it does not so appear, the fact of its existence may be established through the medium of parol or oral testimony. "You may plead the facts which show the contract to be wicked and void, and the cause of action to arise *e turpi causâ*; and the oral evidence is offered not to affect the terms of the contract itself, but to *destroy* the *remedy* by way of action upon it." (*i*) It is competent also to the parties to a deed to show by parol testimony that certain formalities required by act of parliament have not been complied with, and for that purpose to contradict by evidence upon oath statements and assertions of matters of fact contained in the deed itself, such as that the consideration for the grant of an annuity required by the annuity act (17 Geo. 3, c. 26) to be stated and set forth in the deed, has not been *truly* stated. (*k*) Anything, in short, which shows a deed to be void in law, may be averred and proved through the medium of oral testimony.

(*f*) *Hayne v. Malby*, 3 T. R. 438, 441, 442; Vin. Abr. Estoppel M. 455.

(*g*) *Oldham v. Langmead*, cited ib. p. 439, 441.

(*h*) *Davis v. Symonds*, 1 Cox. 405.

(*i*) *Collins v. Blantern*, 2 Wils. 547. *Lightfoot v. Tenant*, 1 B. & P. 555. *Holman v. Johnson*, Cowp. 343. *Doe dem. Small v. Allen*, 8 T. R. 148; Cod. lib. 2, tit. 1, 6.

(*k*) *Kelce v. Ambrose*, 7 T. R. 551.

Of the ordinary RULES of INTERPRETATION.

The *general intention*, to be collected from the whole context, and every part of a written instrument, is always to be preferred to the *particular expression*. (*l*) "Every deed," observes Hobart, C. J., "ought to be construed according to the intention of the parties, and the intent ought to be adjudged of the several parts of a deed as a general issue out of the evidence, and ought to be picked out of every part, and not out of one word only;" and such a construction should be put upon particular words as will best answer and effectuate the apparent general intention, (*m*) "ex antecedentibus et consequentibus optima fit interpretatio, nam turpis est pars quæ cum suo toto non convenit."

Parol evidence to explain the meaning of doubtful expressions and figures, and terms of art.—If the language of a written document is such as the courts do not understand, if it is written in cypher (*n*) or in a foreign tongue, or the parties have used technical terms and words of art, unintelligible to the ordinary reader, but having a clear, distinct, and definite meaning amongst mechanics or merchants, extrinsic evidence of such meaning may be given in aid of the interpretation of the deed, and to give the words their proper and known signification. (*o*)

Bad spelling will not avoid a deed, so long as it appears with certainty what is meant. "Threty" pounds means thirty pounds, and "seutene" seventeen, &c. (*p*)

In construing a will it has been said, "If a man has habitually called certain persons or things by peculiar names by which they are not commonly known, and these words occur in a will executed by him, they may be explained and construed by evidence to show the sense in which he was in the habit of using them, in like manner, as if his will were written in cypher or in a foreign language," (*q*) such evidence being necessary to enable us to put the true construction and meaning upon the peculiar words and form of expression which have been selected by the writer as the vehicle of his intention.

Interpretation of the contract in connexion with surrounding circum-

(*l*) Willes, C. J., *Parkhurst v. Smith*, Willes, 332; Co. Litt. 217 b.; 1 Plowd. 160; 2 B. & P. 22, 27; 3 T. R. 470; Lutw. 196. Domat's Civil Law, l. 1 tit. 1, § 2, xi.

(*m*) Hobart, C. J., Winch 93; 15 East 541; 6 M. & S. 12; 1 T. R. 703; 4 Taunt. 347.

(*n*) *Daintree v. Hutchinson*, 10 M. & W. 89.

(*o*) *Goblett v. Beechy*, 3 Sim. 24. *Clayton v.*

Lord Nugent, 13 Law J., N. S. Excheq. 365.

(*p*) *Hulbert v. Long*, Cro. Jac. 607. *Osborn's* case, 10 Co. 133 a.; 2 Roll. Abr. 147.

(*q*) Ld. Abinger, C. B., *Doe v. Hiscocks*, 5 M. & W. 363. *Doe dem. Beach v. Lord Jersey*, 3 B. & C. 870. *Wigram on Extrinsic Evidence*. Parke, B., *Shore v. Wilson*, 9 Cl. & Fin., p. 555. *Tindal. C. J., ib.* p. 566, 567.

stances.—To enable us also to arrive at the real intention of the parties, and to make a correct application of the words and language of the contract to the subject matter thereof, and the objects professed to be described, all the surrounding facts and circumstances may be taken into consideration. “The law does not deny to the reader the same light and information that the writer enjoyed; he may acquaint himself with the persons and circumstances that are the subjects of the allusions and statements in the written instrument, and is entitled to place himself in the same situation as the party who made the contract, to view the circumstances as he viewed them, and so judge of the meaning of the words and of the correct application of the language professed to be described. (r) Many words in our language are susceptible of various meanings, according to the subject matter to which they are applied, or the situation of the parties by whom they are used, and they should consequently be construed *secundum subjectam materiem*. (s)

A lease had been made by the plaintiff to the defendant, of part of a messuage, together with a piece of ground thereunto adjoining. This piece of ground was used as a yard, and beneath the surface thereof, was a cellar occupied by a third party under a lease previously granted to him by the plaintiff. The occupant of the cellar continued to reside in it, and to pay rent to the plaintiff for three or four years after the latter had demised the yard to the defendant, but his lease having expired, and he having quitted the cellar, the defendant took possession of it, contending that the cellar had passed to him by the demise of the yard, upon the maxim of the common law, *cujus est solum ejus est usque ad cælum et ad inferos*, and that the plaintiff was estopped from introducing parol evidence to control or qualify the operation of the lease; but the court held that parol evidence of the surrounding circumstances might properly be brought in aid of the construction and interpretation of the lease. “The only question,” observes Ashurst, J., “is, whether the court are absolutely bound by the terms of this lease to put the construction upon it for which the defendant contends. *Primâ facie*, indeed, the property in the cellar would pass by the demise, but that might be regulated and explained by circumstances, and it seems to me that the construction of all deeds must be made with reference to their subject matter, and it may be necessary to put a different construction upon leases made in populous cities from that on those made in the country; we know that in London

(r) *Shore v. Wilson*, 9 Cl. & Fin. 555, 569; 5 M. & W. 367, 368; 5 Moor, 406, 457; 1 Myl. & K. 602.
(s) 4 N. & M. 606; 3 B. & Ald. 642.

different persons have several freeholds over the same spot, and that different parts of the same house are let out to different people." (t)

Latent ambiguity.—From the admission of such evidence, and from bringing the words of the written instrument into contact with surrounding circumstances, a doubt sometimes arises as to the correct application of the language and words used to the subject matter of the contract and the objects professed to be described; this is called a *latent ambiguity*, because it is not apparent upon the face of the contract, but arises from the application of the words to the objects to which they refer. As this difficulty or ambiguity is introduced solely by the admission of extrinsic evidence of surrounding circumstances, it may be rebutted and removed by the production of further evidence of the identity of the objects described, in accordance with the ancient maxim, "*ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.*" (u)

This may be illustrated and exemplified by a case analogous to the one mentioned by Pothier. "You rent of me an apartment in a house the remainder of which is occupied by myself. I make you a new lease in these terms: 'I agree to let, and A B agrees to occupy, my house in Frederick Street, for the term of two years from the date hereof, at the annual rent of 20*l.*'" Any one on reading this agreement would imagine that the whole house was intended to be demised, but when evidence of extrinsic circumstances is admitted, for the purpose of applying the language of the contract to the subject matter thereof, a doubt at once arises, whether it was intended that you should have the whole house or the mere apartment which you had previously occupied; and this doubt, which is suggested purely by extrinsic evidence of the relative situations and circumstances of the parties at the time of the making of the contract, may be removed by parol evidence of other circumstances calculated to explain the sense in which the words were used, and to give them a correct application.

The written instrument may also, on the face of it, be perfectly intelligible, and free from all doubt and obscurity, but from some of the circumstances admitted in proof, an ambiguity arises, as to which of two or more things, or which of two or more persons, each answering the words of the writing, the parties intended to designate. There may, for example, be two estates, or two persons of the same name and description, and the

(t) *Doe v. Burt*, 1 T. R. 703. *Press v. Parker*, 19 Moore, 158. Wigram on extrinsic evidence, 39, 58, 2nd edition. *The King v. Lain-*

don, 8 T. R. 379.

(u) Tindal, C. J., *Miller v. Travers*, 1 M. & Sc. 345. Bac. max. 23.

words may equally apply to either. This doubt or difficulty, which has been created by parol evidence, may be removed by further evidence of a like character, calculated to explain which of the estates or persons is embraced by the description in the written instrument. (x) But the evidence, when introduced, must have the effect of rendering the words and language of the document certain and manifest, and must leave no doubt as to the correct application of them, and the precise object to which they were intended to refer; (y) for parol evidence is inadmissible to ascertain and establish the intention as an independent fact. The judgment of the court in expounding a deed, must be simply declaratory of what is in the deed, it has to ascertain, not what the party intended, as contradistinguished from what the words express, but what is the meaning of the words he has used. (z) And "when the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty, as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict plain and common meaning of the words themselves; and evidence *dehors* the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it, for the ablest advice might be controlled and the clearest title undermined, if at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict, or vary, the plain language of the instrument itself." (a)

Latent ambiguity of intention.—And where, by an ambiguity patent on the face of the instrument, the intention of the parties is left in doubt, parol evidence is inadmissible to remove it. (b)

If a blank, for instance, has been left in a deed or will, or an important clause or word has been omitted by mistake, and it is doubtful what word was intended to have been used, the defect cannot be cured by extrinsic evidence of what was *intended* to be inserted. (c)

A devise to one of the sons of J. S., who has several sons, is void

(x) *Cheney's case*, 5 Co. 68, b. *Doe v. Needs*, 2 M. & W. 140, 141. *Doe v. Hiscocks*, 5 M. & W. 368, 369; Wigram, p. 86, 88.

(y) *Thomas v. Thomas*, 6 T. R. 676.

(z) 18 Law J., N. S. (Excheq.) 365; 14 ib. 48, 70, 73; ib. Q. B. 54.

(a) Tindal, C. J., 9 Cl. & Fin. p. 565, 566.

(b) Tindal, C. J., 7 Sc. 415; 5 Bing. N. S. 431. Parke, B., 2 M. & W. 139.

(c) 2 Atk. 239; 3 Atk. 257; 3 Br. C. C. 311; 5 Mad. 364; 8 Vin. Abr. 188 (d).

by reason of the patent ambiguity and uncertainty of *intention* manifest upon the face of the instrument. (d) There is in such a case no doubt as to the particular meaning of the words used; the uncertainty which exists is in the mind of the writer, who, at the time of the making the devise, had evidently not finally fixed on any certain person as the object of his bounty. There is no cure for such a defect, for extrinsic evidence of intention cannot be admitted, even in the case of a will, if the effect of it will be to add new terms to the written instrument, or prove an intention not to be collected from the language and words thereof. Evidence merely explanatory of what the party *has* written is admissible, but not to show what *he intended to have written*.

To admit parol or oral testimony, for the purpose of establishing an intention not manifest in a deed, and not to be collected from any construction that can fairly be put upon the language and words used therein, would be to give to such evidence the superior force of written evidence under seal, and would cause those rights to be created, and those estates and interests to pass by parol, which can only lawfully be created and passed by deed, for it is plain that the parol evidence, and not the writing under seal, would in such a case have the definite effect, and constitute the grant, assignment, or contract. (e)

Of inferences drawn to effectuate an obvious intention and sustain the contract.—But if the ambiguity is not an ambiguity of *intention*, but arises simply from an imperfect expression of the meaning of the party, and can be resolved by reference to the general context of the instrument when brought into contact with surrounding circumstances, the court will aid the imperfect expression in favour of the manifest intention, and will draw all such plain and reasonable inferences from the language and general context of the deed, as appear to be necessary to give effect to the obvious meaning, and to carry into execution any matter or act clearly contemplated and intended to be done. Thus, where a lease under seal recited an agreement made by a lessee, with the lessor to pull down an old smelting mill and *build* another of larger dimensions, and contained an express covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain a covenant to *build* the mill, it was held, that such a covenant was to be implied from the import of the whole deed, and that an action of covenant might conse-

(d) *Strode v. Russel*, 2 Vern. 624. *Richardson v. Watson*, 4 B. & Ad. 787.

(e) *Divinatio non interpretatio est quæ omnino*

recedit a literâ. Bac. tracts, fol. 47; 1 M. & Sc. 347; 9 Cl. & Fin. 555, 556; 13 M. & W. 200.

quently be maintained upon the instrument for the non-erection of the mill. (*f*)

In an action on a bond with a penalty of 2,000*l.*, it appeared that the condition of the bond was to “*render a true, just, and perfect account in writing*” of all sums received, and it was held, that this condition was broken by the obligor’s neglect to *pay over* such sums, as it never could be meant that so large a penalty should be taken merely to enforce the making out of a paper of items and of figures. (*g*)

If an important word has clearly been omitted by mistake, and it appears from the general context of the instrument, and the light thrown thereon by surrounding circumstances, and the nature of the transaction, what the parties really meant and intended, the courts, in furtherance of the obvious intent, will read and construe the deed as if the word had been duly inserted. Thus, where the obligor in the obligatory part of a money bond, purported to have bound himself in seven thousand seven hundred of lawful money of Great Britain, without mentioning the description of money, it was held, that as it was the obvious intention of the parties, from the general context of the instrument, that the obligor should be bound in a penalty calculated in *pounds sterling*, the deed must be read as if the word *pounds* had been originally inserted; (*h*) and the same principle of construction was adopted, where the word *hundred* had evidently been left out by mistake. (*i*) So, where the name of the obligee of a bond was omitted in the obligatory part of the instrument, and it did not consequently there appear to whom the obligor had become bound, but it afterwards appeared, from the condition, who it was, the bond was held good by reference to the condition, and was construed as if no such clerical error had occurred. (*k*) So, where the name of the grantor had been omitted in the operative part of a grant, but it clearly appeared from another part of the deed who he was, the deed was held to be valid, and was carried into full operation. (*l*)

A deed, therefore, shall not, in such cases, be construed to be of no effect, nam benignæ faciendæ sunt interpretationes chartarum ut res magis valeat quam pereat. (*m*)

Admissibility of parol evidence of custom and usage.—Customary

(*f*) *Sampson v. Easterby*, 9 B. & C. 505; 4 M. & R. 422, s. c. *Saltoun v. Houston*, 1 Bing. 433; 8 Moore, 546, s. c.

(*g*) *Bache v. Proctor*, 1 Dong. 382.

(*h*) *Coles v. Hulme*, 8 B. & C. 568; 3 M. & R. 86, s. c.

(*i*) *Wagh v. Russell*, 1 Marshall, 214.

(*k*) *Langdon v. Goole*, 3 Lev. 21; 2 Rolle Abr. 148. *Uvedale v. Halfpenny*, 2 P. Wms. 151. *Elliott’s case*, 2 East, P. C. 951.

(*l*) *Say (Lord) and Selé’s case*, 10 Mod. 46; 1 Brown’s parl. cas. 379, s. c.

(*m*) See Platt on Covenants, chap. 2, and Bacon’s Abr. title (covenant.)

rights and incidents universally attaching to the subject matter of the contract in the place and neighbourhood where the contract was made, are impliedly annexed to the written language and terms of the contract, unless the custom is particular and expressly excluded. (n) Parol evidence of custom and usage, consequently, is always admissible to enable us to arrive at the real meaning of the parties who are naturally presumed to have contracted in conformity with the known and established usage. Thus the custom of the country, in regard to the claims of an outgoing tenant of a farm will prevail, although there be a lease under seal regulating the terms of the *holding*, but not containing stipulations as to the terms of *quitting*, which can exclude the custom. (o) The customary right of a tenant to the away going crop, to compensation for work and labour, seed, and materials employed in manuring, tilling, and sowing the land, also the customary right of a landlord or reversioner to a heriot on the death of a tenant for life, and all customs and usages respecting the cultivation of the soil and the mode of husbandry, will impliedly prevail, if the lease is silent respecting them, and parol or oral evidence is consequently admissible to superadd the usage and customary right to the contract between the parties, such right and usage being recognised by law as incident to the subject matter of the contract, and consequential upon the taking of the lands. (p)

Exclusion of the custom by express words.—But parol evidence of custom and usage is not admitted to contradict or vary express stipulations and provisions restricting or enlarging the exercise and enjoyment of the customary right. Omissions may be supplied by the introduction of the custom, but the custom cannot prevail over and nullify the express provisions and stipulations of the deed. (q)

If a lease, for example, contains an express provision as to the disposal of the away going crop the custom in respect thereof is excluded. (r) If it specifies and regulates the particular allowances that are to be made by an incoming to an outgoing tenant, evidence of usage and custom as to those allowances is inadmissible. (s)

Influence of custom upon the meaning and interpretation of words.

(n) *In contractibus tacite veniunt ea quæ sunt moris et consuetudinis.* Domat, l. 1, tit. 1.

(o) *Holding v. Pigott*, 5 M. & P. 427; 7 Bing. 745, s. c. *Hutton v. Warren*, 4 M. & W. 475, 476.

(p) *Wigglesworth v. Dallison*, 1 Doug. 201. *Senior v. Armitage*, Holt, N. P. C. 197. *Dalby v. Hirst*, 3 Moore, 536; 1 B. & B. 224, s. c. *White v. Sayer*, Palm. 211.

(q) *Parkinson v. Collier*, Parke Ins. 314. *Roxburghe v. Robertson*, 2 Bligh. 166. *Blackett v. R. Ex. Ass. Compy.*, 2 C. & J. 244; 2 Tyr. 266, s. c.

(r) *Boraston v. Green*, 16 East, 71.

(s) *Webb v. Plummer*, 2 B. & Ald. 746. *Roberts v. Barker*, 1 C. & M. 808; 3 Tyr. 945, s. c.

—Custom and usage have a powerful influence upon the interpretation of contracts, and determine to a great extent the meaning of the words used therein. If by the known usage of trade or by custom, a word has acquired, in respect of the subject matter of the contract, a peculiar sense and meaning different from the ordinary popular sense and meaning, parol evidence is admissible to show that the parties used the word in its customary trade acceptation, and not in the ordinary popular sense. (*t*) Thus, the word *thousand* in certain trades comprehends a larger number of units than it does in its ordinary acceptation. In the herring trade, for example, *six* score herrings go to the hundred, and *sixty* to the thousand; (3 Ed. 3, stat. 2, cap. 2;) and parol evidence is admissible consequently, to show that the word *thousand*, when applied to herrings, in the contracts of herring dealers means twelve hundred. In a lease of a rabbit warren, parol evidence was admitted to show that by the custom of the country where the lease was made, in taking an account of the rabbits on a rabbit warren, the numbers were computed at one hundred dozen to a thousand, and the word “*thousand*” in a lease as applied to rabbits was consequently construed to mean one hundred dozen or twelve hundred. (*u*) So, where an insurance was effected “to any port in the Baltic,” evidence was admitted to show that the Gulf of Finland was considered by universal custom and consent amongst merchants and in mercantile contracts to be within the Baltic, though the two seas were treated as distinct by geographers. (*x*) And in a lease of a coal mine evidence was admitted to show that the word “*level*” in mining districts had a meaning different from the ordinary popular meaning, and that the word was used by the parties to the contract in the sense in which it is ordinarily employed by miners. (*y*)

OF COVENANTS. No precise form of words is necessary to create or constitute a covenant. The words in a contract under seal, “I will be answerable,” or “I will be accountable” to A. for 10*l.*, or “I am content to give A. 10*l.* at Michaelmas,” amount to a covenant to pay the money, (*z*) and words used in the future tense, unconnected with precedent words of agreement, will in themselves be sufficient to constitute an express covenant, such as the words in a lease, “and the said W., his executors, &c., shall sufficiently repair, &c., (*a*) and an action of covenant will lie on

(*t*) 4 East, 134; 6 N. & M. 94; 5 Ad. & E. 302; 1 Rolle Abr. 86, pl. 1, 525, pl. 7; 14 Law, J. Rep. N. S. (Excheq.) 48.

(*u*) *Smith v. Wilson*, 3 B. & Ad. 728.

(*x*) *Udke v. Walters*, 3 Campb 16. See also *Brough v. Whitmore*, 4 T. R. 210. *Anderson*

v. Pitcher, 2 B. & P. 168.

(*y*) *Clayton v. Gregson*, 4 N. & M. 602; 1 Harrison, 159, s. c.; 5 Ad. & E. 302, s. c.

(*z*) 3 Leon. 119, pl. 169. *Brice v. Carre*, 1 Lev. 47; 1 Keb. 155, s. c.

(*a*) *Brett v. Cumberland*, Cro. Jac. 399, 521.

general words of contract and agreement contained in a deed, although the parties profess not to contract "by way of covenant," as where they "resolved and agreed and did, *by way of declaration*, and *not of covenant*, spontaneously and fully agree," Lord Eldon said it was nonsense to talk of agreeing and declaring (under seal) without covenanting. (b) And whenever a contract under seal contains words clearly purporting an agreement to do any act, whether in the way of covenant, provision, or exception, or by necessary implication, such words amount to a covenant in the eye of the law, and an action of covenant may consequently be maintained upon them. (c)

A lessee covenanted that he would at all times during the term for which the lands and premises were demised to him, plough, sow, manure, and cultivate them, "except the rabbit warren and sheep-walk, in a regular and due course of husbandry, according to the custom of the country," and it was held that, as the parties clearly meant by the exception that neither the rabbit warren nor the sheep-walk should be ploughed, the exception ought to be construed as a covenant that it should not be done, and that an action of covenant consequently was maintainable for the doing of it. "By whatever words," observes Tenterden, C. J., "we collect an agreement that a thing should not be done, we collect enough to make an action of covenant maintainable for the doing of it." (d) So when it was agreed that a lessee should have "*conveniens lignum non succidendo arbores*," it was holden that the lessor might have an action of covenant against him on these words for cutting down the trees. (e)

Words of recital in a deed will constitute an agreement between the parties upon which an action of covenant may be maintained. "As if I recite by my deed that I am possessed of such an interest in certain land, and assign it over by the same deed, and thereby covenant to perform all agreements in the deed, if I be not possessed of such an interest, the covenant is broken. (f) Thus, where a termor for ninety-nine years, if three lives should so long continue, recited his interest, and that one life was in being, and assigned his term, it was adjudged that this recital amounted to a covenant that the life continued. (g) So the recital in a deed of a previous agreement to do a certain act, amounts to a covenant in the deed for the performance of it, for the recital operates as a solemn confirmation of the "agreement and intent precedent." (h)

3 Bulstr. 163, s. c.

(b) *Ellison v. Bignold*, 2 J. & W. 510.

(c) Tenterden, C. J., *Sampson v. Easterby*, 9 East. 514.

(d) *Duke of St. Albans v. Ellis*, 16 East. 352.

(e) March 9, pl. 22. Dy. 19, b. pl. (115.)

Stevenson's case, 1 Leon. 324.

(f) *Gawdy, J., Severn & Clark's case*, 1 Leon. 122.

(g) *Best v. Brett*, cited in *Holles v. Carr*, 3 Swanst. 649.

(h) *Barfoot v. Frewell*, 8 Keb. 465.

Words of proviso and condition will also be construed as an express covenant, when such a construction is necessary to give effect to the apparent intention of the parties. Thus, where a conveyance was made by the plaintiff of an incorporeal right to the defendant, provided that out of the first profits the defendant should pay the plaintiff 500*l.*, it was holden that an action of covenant might be maintained on these words of proviso for the non-payment of the money. (*i*) So, where a lease was granted on condition that the lessee should keep and leave the demised premises, at the end of the term, in as good plight as he found them, it was holden that an action of covenant would lie for a breach of this condition. (*k*)

Where, however, the proviso or condition is by way of qualification of the covenant, or defeazance of the deed or of the estate and interest thereby created, and not in the nature of an *agreement*; as if a lease be granted, provided and on condition that the lessee collect and pay the rents of the other houses of the lessor, an action of covenant is not maintainable. (*l*)

If lessee for years covenants to repair, "provided always and it is *agreed* that the lessor shall find great timber, &c.," a covenant is created on the part of the lessor to find the timber by reason of the word "*agreed*;" but if the lessee had covenanted to repair provided the lessor found the timber, without the word "*agreed*," the proviso would not have amounted to a covenant on the part of the lessor, but to a qualification only of the covenant of the lessee. (*m*)

The lessee covenanted that he would at all times during the continuance of his lease fold his flock of sheep which he should keep upon the demised premises upon such parts where the same had been usually folded. It was held that this amounted to a covenant to keep a flock of sheep upon the premises, and that it would consequently be no answer to an action upon the covenant for the defendant to say that he kept no sheep, and therefore had none to fold. (*n*) A landlord demised certain limestone quarries and lime-kilns to a tenant, who covenanted, amongst other things, that he would, at all times and seasons of burning lime, *supply* the lessor and his tenants with lime at a stipulated price, for the improvement of their lands and the repair of their houses; and it was held that this amounted to a covenant to *burn* lime at such seasons, and that it was not a good defence to plead that there was no lime burned on the premises out of which the lessor could be supplied. (*o*)

(*i*) *Clapham v. Moyle*, 1 Lev. 155; 1 Keb. 842, 860, 897, s. c. See also *Parker v. Gravenor*, 2 Dy. 150 a.; and 19, pl. 38, s. c.
(*k*) 1 Rolle, Abr. 518; Bac. Abr., Covt. (A).
(*l*) *Geery v. Reason*, Cro. Car. 128. *Simpson*

v. Tetterell, Cro. Eliz. 242.

(*m*) 1 Rolle Abr. 518.

(*n*) *Webb v. Plummer*, 3 B. & Ald. 749, 751.

(*o*) *Earl of Shrewsbury v. Gould*, 2 B. & Ald. 487.

If two persons covenant together that it shall be lawful for the one to hold possession of the other's property for a certain time, the law infers therefrom an agreement that he shall not detain it for a longer time, but shall then give it up to the owner; if, then, he detains it beyond that time, it is a breach of covenant. (*p*) Therefore, where it was covenanted and agreed in a charter-party of affreightment, that "forty days should be allowed for unloading a vessel and loading her again," it was held that this amounted to a covenant not to detain the ship for loading and unloading beyond the forty days. (*q*)

Words of *exception and reservation* in an indenture of lease sometimes operate as an express GRANT of an *incorporeal hereditament*.

A lord of a manor conveyed to one W. and his heirs certain lands and premises, parcel of the demesne of the manor, excepting and reserving to himself, his heirs and assigns, free liberty, with servants or otherwise, to come into and upon the lands so conveyed, and there to hawk, hunt, fish, and fowl at any time thereafter, at their will and pleasure; and it was held that the words of reservation or exception so used operated as an express grant of an incorporeal hereditament, (*r*)—that the liberty of hawking, hunting, fowling, and fishing granted to a person, *his heirs, executors, and assigns*, amounted to a *profit a prendre*, authorizing the grantee to take and to *carry away* the fowl and the fish, and not to a mere license of pleasure, and that it conferred upon the grantee a right to send his servants to hawk, hunt, fish, and fowl for him in his absence.

Licenses operating as GRANTS of an incorporeal hereditament. A license, sealed and delivered as a DEED, authorizing the licensee to go upon another man's land or to make use of it for profit, operates as a grant of an easement, or of an incorporeal hereditament, but a mere license of pleasure amounts only to a personal contract, or to an ordinary covenant between the parties, and does not transfer to the licensee and his heirs any right over, or interest in, the soil and freehold of the licensor. A license by deed to hunt deer, or to fish, granted to a man, and his heirs and assigns, would, as we have just seen, authorize him to take away the deer killed and the fish caught, and would amount, consequently, to a grant of an incorporeal hereditament and *profit a prendre*. "If one license me and my heirs to come and hunt in his park, I must have a writing (that is a deed) of that license, for a thing passes by the license, which endures in perpetuity, but if he license me one time to hunt, this is good without deed, for no inheritance passes." (*s*) If the license be a mere personal license

(*p*) Lord Ellenborough, *Randall v. Lynch*, 12 East, 182.

(*q*) *Ib.* p. 178.

(*r*) *Wickham v. Hawker*, 7 M. & W. 63. *Doe*

dem. Doug. v. Lock, 2 Ad. & E. 748.

(*s*) Year Book, 11 Hen. 7, fol. 86, cited by Parke, B., 7 M. & W. 79.

of pleasure, the licensee cannot take away to his own use the game killed, or go with servants upon the land, still less send servants to kill for him, or assign his license to another.

A license under seal to convey coals or timber in carts, or water in drains or channels, through or across the land of the licensor, is a license of profit, and not of pleasure, and would amount to a grant of a right of way, or of a water-course.

A license under seal may be of such a nature as to operate in respect of some things as a license of pleasure merely, and as to others as a grant of an incorporeal hereditament, and a direct transfer of an estate or interest in the land. "A dispensation or license," observes Willes, C. J., "properly passeth no interest, nor alters or transfers property in anything, but only makes an action or something done by the party lawful, which without it would have been unlawful, as a license to hunt in a man's park, or to come into his house, which without license would be unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use, to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down the tree; but as to carrying away the deer killed and tree cut down, they are GRANTS. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by; as to the actions of eating, firing my wood, and warming him, they are licenses, but it is consequent necessarily to those actions that my property be destroyed in the meat eaten, and the wood burnt, so as in some cases by consequent, and not directly, and as its effect, a dispensation or license may destroy and alter property." (t)

Of BONDS or OBLIGATIONS.

No precise form of words is essential or necessary to create a bond or obligation. (u) Any memorandum in writing under seal, acknowledging a debt, or denoting the intention of the party to bind himself for the payment of a sum of money, will oblige him as effectually as the most formal words he can make use of,—such, for example, as "I, A. B., have borrowed 10*l.* of C. D." or "Memorandum that A. owes B. 10*l.*," or "I have agreed to pay J. S. 10*l.*," or "all things being reckoned and accounted between A. and B., it is admitted that A. owes B. 10*l.*;" for however the words *teneri et firmiter obligari* are generally put into every common bond, yet when any other words purport the same

(t) Vaughan, C. J., *Thomas v. Sorrell*, Vaugh. 330. *Wood v. Ledbitter*, 14 Law J. N. S. (Exch.) 164.

(u) *Dodson v. Kayes*, Yelv. 193; 2 Rolle Abr. 146, 147. *Johnson v. Morgan*, Cro. Eliz. 758. *Hardman v. Hardman*, ib. 886.

effect, and the same sense in writing, the law shall construe them to have like efficacy. Thus, if a man by writing, sealed and delivered, recites that "whereas he had 100*l.* of J. S., he hath paid him forty pounds, and there remain sixty," this is a good bond, binding him to pay the sixty pounds; for every word which proves a man to be a debtor, if it be under seal, shall charge him with the payment of the money. (*x*) In an action upon a bond, the plaintiff in his declaration alleged that the defendant was bound to him by his writing obligatory for the payment of the sum of 20*l.*; upon oyer the words of the deed were, "I do acknowledge to Edward Watson by me 20*l.* upon demand, for doing the work in my garden," and this was held to be a good bond for 20*l.* (*y*) A memorandum to the following effect, "Be it known that I owe to S. Spurr. 14*l.*, besides 6*l.* by bill," was adjudged a good obligation for 20*l.* (*z*)

If no time is limited in a bond for the payment of money borrowed or acknowledged to be due, such money is due immediately, and payable on demand, (*a*) and if it is to be paid on a day that is past, the money shall be due and payable immediately. But if it be for the performance of an act on the 29th of February next following, and the next February has only twenty-eight days, it has been said that the party is not bound to do the act until the next leap year, when February has twenty-nine days! (*b*)

SECTION II.

OF THE LEGAL FORCE, AND EFFECT, AND INTERPRETATION, OF SIMPLE CONTRACTS IN WRITING.

Inadmissibility of oral evidence to add to, alter, or contradict, a written contract.

Most systems of jurisprudence have manifested a decided preference to written memorials over verbal representations founded on the doubtful or imperfect recollection of witnesses. The French law requires a very large class of contracts to be put into writing, "in consequence," it observes, "of the corruption of manners and subornation of witnesses," and formally prohibits the admission of oral evidence against the contents of a written document. (*c*)

(*x*) *Cox's case*, Dyer, 22 b. *Bedow's case*, 1 Leon. 25; Bac. Abr. p. 804.

(*y*) *Watson v. Snaed*, Vent. 238.

(*z*) *Spurr v. Wood*, cited Dyer 22, b., n. 137.

(*a*) 1 Brownl. 53.

(*b*) 1 Leon. 101. As to penal obligations, see post, sec. 3.

(*c*) *Pothier*, p. 4, c. 2, art 1..

It is a fundamental rule of our own common law that oral evidence shall not be given, to add to, subtract from, or in any manner alter, or vary any description of written contract; "*quoties in verbis nulla est ambiguitas, nulla expositio contra verba fienda est.*" This general rule or principle of law has been established on the ground that the writing stands higher in the scale of evidence than the oral testimony, and that the stronger evidence ought not, therefore, to be controlled or altered by the weaker. (b) Thus it has been held, that the verbal declaration of an auctioneer, made at the time of sale, cannot be given in evidence in opposition to the printed conditions of sale, (c) and that an oral compact or understanding, entered into at the time of the signing of a written agreement for a lease, cannot be given in evidence in opposition to the agreement, to show that the rent was to commence from a later day than that named therein. (d)

If a written contract of purchase and sale fixes the time for the completion of the purchase, or the time for the delivery of the goods, an agreement to substitute another day must be expressed in writing, (e) and if the time for payment is named, oral evidence is inadmissible to show that the payment was to be prolonged, or that it was to depend on a contingency or be made out of a particular fund. (f) Oral evidence is inadmissible to make a promissory note absolute upon the face of it, conditional or payable upon a contingency, (g) or to make a contract, which, by the terms of it, is to commence *in presenti*, to commence *in futuro*; (h) or to show that it was agreed, when a bill or note was given or indorsed, that the instrument should be renewed, and that payment should not be demanded at the time when it became due. (i)

A warranty, made orally on the completion of a written contract of sale, cannot be introduced as part of the contract if the contract itself is silent as to the fact of such warranty. (k) If a written demise be silent as to the payment of the ground rent (l) or land tax, (m) oral evidence is inadmissible to show that the tenant agreed to pay it. If a written contract of purchase and sale is silent as to the time of payment or delivery, oral evidence is inadmissible to show that credit was bargained for

(b) *Lord Hardwick*, 2 Atk. 383; 1 Cox, 402.
 (c) *Gunnis v. Erhart*, 1 H. Bl. 289.
 (d) *Henson v. Coope*, 3 Sc. N. R. 48.
 (e) *Stead v. Dawber*, 10 Ad. & E. 57; 2 P. & D. 451 s. c. *Marshall v. Lynn*, 6 M. & W. 109. *Stovell v. Robinson*, 3 Bing. N. S. 928.
 (f) *Hoare v. Graham*, 3 Campb. 57.
 (g) *Rawson v. Walker*, 1 Stark. 360. *Moseley v. Hanford*, 10 B. & C. 729. *Foster v. Jolly*, 1 C. M. & R. 703; 2 Tyr. 239 s. c. *Free v.*

Hawkins, 1 Moore, 535, 542; 8 Taunt. 92 s. c. *Adams v. Wordley*, 1 M. & W. 374; 1 Tyr. & G. 620 s. c.
 (h) *Williams v. Jones*, 7 D. & R. 548; 5 B. & C.; 108 s. c.
 (i) *Hoare v. Graham*, 3 Campb. 56. *Brown v. Langley*, 5 Sc. N. R. 249.
 (k) *Powell v. Edmunds*, 12 East, 6.
 (l) *Preston v. Morceau*, 2 Bl. 1249.
 (m) *Rich v. Jackson*, 4 Br. C. C. 515.

and intended to have been given, (*n*) or that the goods were to be delivered or removed at a precise time or in any particular manner. (*o*) When an agreement for a lease has been drawn up in writing, oral evidence cannot be given to show that more premises were intended to be included in the agreement than those actually mentioned in it, or that a greater rent was to be paid than that actually expressed, or that the rent was to commence at a later day than that named in the agreement;” (*p*) for whenever the contract is reduced into writing, nothing that is not found impressed upon it can be considered as forming part of the contract. (*q*) But the contract may be evidenced and established, as we have previously seen, through the medium of several writings, as well as by one document, and the import of a written paper, purporting to contain the terms of a contract, may be controlled, altered, or extended, by a cotemporaneous agreement *in writing*; (*r*) provided it be shown that both papers refer to the same subject matter, persons, and things.

The rule of law, excluding the admission of oral testimony, for the purpose of adding to, or enlarging the terms of a written contract, holds with still greater force in the case of agreements required by law to be authenticated by writing, for to allow such agreements to be proved in any material part by oral testimony, would be to substitute in the place of the written contract required by statute, a contract established partly by writing, and partly by oral testimony, and would let in all the mischiefs that it was the object of the legislature to prevent. Oral evidence consequently is inadmissible, as we have already seen, to connect together letters or writings, having no obvious or necessary connexion or reference to each other, in order to establish a contract in writing within the provisions of the Statute of Frauds. (*s*)

Oral testimony in aid of insufficient written evidence of a contract.—

But a contract not required to be in writing by the Statute of Frauds may be evidenced and established through the medium of oral and written testimony. If a written document amounts to a mere admission or acknowledgment of certain facts, forming a link only in the chain of evidence by which a contract is sought to be established, it may be given in evidence concurrently with, and may be aided and supported by, oral testimony. (*t*)

Thus, in the case of a contract for work and services, if the names of

(*n*) *Ford v. Yates*, 2 Sc. N. R. 645.

(*o*) *Greaves v. Ashlin*, 3 Campb. 425.

(*p*) *Meres v. Ansell*, 3 Wils. 275. *Henson v. Cooper*, 3 Sc. N. R. 48.

(*q*) *Kain v. Old*, 4 D. & R. 61; 2 B. & C.

634 a. c. *Pickering v. Dawson*, 4 Taunt. 786.

(*r*) *Brown v. Langley*, 5 Sc. N. R. 254.

(*s*) *Boydell v. Drummond*, 11 East, 142.

(*t*) *Allen v. Pink*, 4 M. & W. 144.

the contracting parties are not mentioned, or the price to be paid for the work is not specified, or the quantity not named, and the writing consequently does not amount to a contract, oral proof of the additional facts and circumstances necessary to constitute a contract and give effect to the transaction, is admissible. (u) Such evidence does not alter or add to an existing contract, as no contract exists independently of it.

Any mere admission, or averment of a fact also, in writing, may be contradicted by oral testimony. If a bill of exchange or promissory note purports on the face of it to be made for *value received*, it is competent to the parties to show that no value was received, (x) and if a receipt or acknowledgment of the payment of money has been given, oral evidence is admissible to contradict such receipt or acknowledgment and rebut its legal operation as a discharge from liability. (y) And although oral terms, stipulations, or agreements, made either before the written instrument was completed, or during the time that it was in a state of preparation, cannot be given in evidence, so as to add to, or in any manner vary or qualify, the terms of the written engagement, yet "it is competent to the parties, at any time before breach of the agreement, by a new contract not in writing, to waive and annul the former agreement, so as to prevent either party from recovering on the contract which was in writing." (z)

Oral evidence, offered to show subsequent matter of discharge from liability, affects only the *remedy* by way of action upon the contract; it does not in any way impugn or alter the terms of the written agreement itself. Admitting the contract, it seeks to show that the party has no right to enforce it. It is admissible consequently on the part of a defendant for the purpose of *discharging* himself and defeating the action upon the contract, but cannot be introduced by a plaintiff who comes to have an omission rectified, or to introduce a new term into the written agreement, or to substitute in the place of the original written contract a new contract, to be proved partly by the written agreement, and partly

(u) *Meath v. Lord Belfield*, 1 Wils. 215. *Knapp v. Harden*, 1 Gale, 47. *Jeffery v. Watson*, 1 Stark. N. P. C. 267. *Ingram v. Lee*, 2 Camp. 521; *Bosanquet, J.*, 2 Sc. N. E. 656. *Eden v. Blake*, 9 Jurist, 213.

(x) *Foster v. Jolly*, 1 C. M. & R. 708; 5 Tyr. 239, s. c. *Radout v. Bristow*, 1 C. & J. 231; 1 Tyr. 84, s. c. *Holliday v. Atkinson*, 8 D. & R. 165; 5 B. & C. 503, s. c.

(y) *Straton v. Rastall*, 2 T. R. 366. *Lampon v. Cooke*, 5 B. & Ald. 611. *Graves v. Key*, 3 B. & Ad. 813. *Fairman v. Budd*, 5 M. & P. 534; 7 Bing. 574, s. c. *Scholey v. Walmsey*,

1 Peake N. P. C. 84. *Holsten v. Jumpson*, 4 Esp., p. 190. *Fairman v. Budd*, 5 M. & P. 540. *Skaffe v. Jackson*, 3 B. & C. 423. By the French law, the contents of a written document may be impeached as false by an original process called *inscription de faux*; but until that charge is decided, and they are adjudged to be so, credit is given to them provisionally. *Pothier*, p. 4, c. 1. art. 1. § 3.

(z) *Denman, C. J.*, *Goss v. Lord Nugent*, 5 B. & Ad. 61; 2 N. & M. 33, s. c.; *Lord Eldon*, 9 Ves. 250.

by subsequent verbal terms engrafted upon it. (a) The admission of such evidence in the last case would have the effect of *varying* or adding to the terms of the written agreement, and would, moreover, be in direct contravention of the Statute of Frauds; but its admission in the first case is consistent with the contract and with the provisions of the statute. The Statute of Frauds has not altered the situation of a defendant against whom a contract is sought to be enforced; it says that no action shall be brought unless the agreement is in writing; but does not require written evidence of the dissolution of the contract, or of a subsequent discharge from liability, and does not consequently prevent the *defendant* from giving the same evidence, now that he might have given before the statute. (b)

Effect of altering a simple contract in writing after its execution.—Any material alteration of a written contract, made without the privity and assent of the party to be affected by it, at once vitiates and avoids the contract.

Subsequently to the execution of a guarantee, and whilst it was in the possession of the plaintiff, a seal was affixed to the defendant's signature, giving to the guarantee the character and appearance of a deed, and it was held that this was such an alteration in a material particular as avoided and vitiated the contract. (c) When a bill or note is produced, displaying a material alteration upon the face of it, the plaintiff must disclose the circumstances under which it was made, and show that it is not such an alteration as vitiates the security, or renders a new stamp necessary. (d) But if the alteration is immaterial and does not affect the plaintiff's right of action, no explanation of it is required. (e)

Simple contracts governed by the same rules of interpretation as deeds.—"The same sense," observes Lord Ellenborough, C. J., "is to be put upon the *words* of a contract in an instrument not under seal as would be put upon the same words in any instrument under seal; for the same intention must be collected from the *same words* of a contract in writing whether with or without a seal." (f) "When the several cases respecting the construction of written instruments are closely examined, it will be found that the apparent conflict of authorities arises more from the variety of terms employed by the parties themselves in

(a) *Stead v. Dawber*, 10 Ad. & E. 57. *Marshall v. Lynn*, 6 M. & W. 109.

(b) Sugd. on Powers, 238, 232, ed. 1839; 5 Law Mag., 375—385; 14 Ves. 524; 1 Sch. & Lef. 39; 1 Taunt. 509.; 7 Ad. & E. 49.

(c) *Davidson v. Cooper*, 11 M. & W. 778, 779;

13 Law, J., N. S. (Excheq.) 277, a. c. in error.

(d) *Clifford v. Lady Parker*, 3 Sc. N. R. 234. *Cariss v. Tattersall*, ib. 260.

(e) *Earl of Falmouth v. Roberts*, 9 M. & W. 469.

(f) *Seddon v. Senate*, 13 East, 73.

framing their contracts, than from difference of opinion in the judges who interpret them. The whole contract must be taken together, and due effect given to the several clauses that counteract or qualify each other, and it often happens that the same expressions will bear different meanings, and require a different interpretation, according to the context of the instrument in which they are found. The intention of the contracting parties must be collected from the whole scope of the instrument." (g)

Agreements for leases.—In order to determine whether a contract for the hiring and letting of land entered into prior to the coming into operation of the transfer of property act, is an actual lease and operates as a present demise, regard must be had to the apparent intention of the parties as it is to be collected from the whole agreement, construed in connexion with surrounding circumstances, and the situation and acts of the parties themselves at the time of the making of the contract. (h) Where the words are *de presenti*, I demise, &c., there is, of course, an immediate lease, provided the situation and circumstances of the parties favour such a construction. Where the words are in the future tense, and the agreement is that the party *shall* hold and enjoy, and he is afterwards put into actual possession of the land, the landlord shall not afterwards turn him out of possession, and say that it was not a present demise; for the permitting the party to enter is strong evidence to show that the landlord intended to give a present interest. But where the words themselves do not necessarily imply it, and where possession is not given and there is no other act to manifest such an intention, then it is merely an executory contract." (i) And an agreement may operate as an actual demise and convey a present interest in the land, although there may be an express stipulation in the agreement for the future execution of a lease. (k) No precise words or technical form of language are requisite to constitute a present demise. An estate or term of years in the land may be created and vested in a third party, by giving him a license to enjoy a house, or making an agreement with him that he "shall reside" therein, provided some certain rent or specified service is reserved,

(g) Tindal, C. J., *Belcher v. Capper*, 5 Sc. N. R. 316; Parke, B., 6 M. & W. 104. *Palmer v. Temple*, 9 Ad. & E. 508.

(A) Tindal, C. J., 5 Sc. 530, *Curling v. Mills*, 7 Sc. N. R. 725. *Gore v. Lloyd*, 12 M. & W. 479. *Alderman v. Neate*, 4 M. & W. 720. *Doe dem. Morgan v. Powell*, 14 Law J., N. S. 5.

(i) Lord Kenyon, C. J., and Ashurst, J., *Doe v. Ashburner*, 5 T. R. 167, 168. *Perring*

v. Brook, 7 C. & P. 362. *Bicknell v. Hood*, 5 M. & W. 104, 108. *Brashier v. Jackson*, 6 M. & W. 549.

(k) *Doe d. Pearson, v. Ries*, 1 M. & Sc. 259; 8 Bing. 178, s. c. *Poole v. Bentley*, 12 East, 168. *Warman v. Faithful*, 5 B. & Ad. 1042; 8 N. & M. 137, s. c. *Alderman v. Neate*, 4 M. & W. 720. *Pinero v. Judson*, 3 M. & P. 504; 6 Bing. 206, s. c. *Wilson v. Chisholm*, 4 C. & P. 474. Parke, B., *Chapman v. Townner*, 6 M. & W. 103.

or something is given as the consideration for the contract. (l) "If there are any words showing a present intention that one is to give and the other to have possession for a determinate term, a tenancy is created," (m) and this intention may be manifested by expressions contained in a series of letters, as well as by the formal words of a single instrument; (n) also by the nature and extent of the lessor's interest in the land, the things done and to be done by virtue of the contract, and the peculiar circumstances of each case. And, on the other hand, although there be precise and formal words of present demise, yet if you collect from the face of the entire contract a contrary intention, the instrument shall be considered only an agreement for a future lease, and shall not operate as a present demise. (o)

In the case of simple contracts, as in the case of deeds, the courts will draw all such plain and obvious inferences as appear to be necessary to give effect to the contract. Thus, where a bill of exchange was made for twenty-five, seven shillings and three pence, the courts construed it to mean twenty-five *pounds*, seventeen, &c. (p) And where a written undertaking was given to a tailor to pay him "the sum of 6*l.* 4*s.* for a suit of ordered by Daniel Page," it was construed, in connexion with surrounding circumstances, to mean a suit of *clothes*; (q) and when a promissory note contained the words, "I promise *not* to pay," the word *not* was rejected.

Custom and usage have the same influence upon the exposition of simple contracts that they have upon the exposition of contracts under seal. The known and received usage of trade, and the established course of mercantile dealing, are considered to be tacitly annexed to the terms of a mercantile contract, if there be no words therein expressly controlling or excluding the ordinary operation of the usage, and parol evidence thereof may consequently be brought in aid of the written instrument. (r) Thus, although a bill of exchange is on the face of it payable on a day certain, yet the three additional days of grace, accorded by the known custom of merchants, are permitted to be annexed to the terms of the written instrument, and made a part of the contract.

(l) Co. Litt., 45 b.; Bac. Ab. (Leases, K.) Yates, J., *Right d. Green v. Proctor*, 4 Burr. 2209.

(m) Parke, B., *Bicknell v. Hood*, 5 M. & W. 108.

(n) *Chapman v. Bluck*, 5 Scott., 531; 4 Bing. N. S. 187, s. c. *Jones v. Reynolds*, 1 Ad. & E. N. S. 506.

(o) *Morgan v. Bissell*, 3 Taunt. 72. *Hayward v. Haswell*, 6 Ad. & E. 273; 1 N. & P.

411, s. c. *Rawson v. Bicks*, 7 Ad. & E. 451; 2 N. & P. 423, s. c. *Dunk v. Hunter*, 5 B. & Ald. 326; 11 M. & W. 407; 4 Ad. & E. N. S. 367.

(p) *Phipps v. Tanner*, 5 C. & P. 488. *Elliott's case*, 2 East, P. C. 951.

(q) *Jarvis v. Wilkins*, 7 M. & W. 410.

(r) Parke, B., *Hutton v. Warren*, 1 M. & W. 475. *Bowne v. Gatliffe*, 3 Sc. N. B. 40, 41. *Clarke v. Royston*, 14 Law J. N. S. Excheq. 143.

The general warranty in a policy of insurance to sail with convoy, is construed, according to the usage of merchants, to depart with convoy from the nearest customary place of rendezvous where convoys are to be had. (s)

When a workman is hired for a year, to work at a particular trade, under a written agreement which says nothing as to any period of absence to be allowed to the workman, oral evidence may be given to show that it is the custom of the particular trade for the workmen employed in it to take certain holidays, and to absent themselves on such occasion from their work, without the permission of their masters (t) But the custom and usage, sought to be established, must be shown to be a generally recognised practice and usage, with reference to the trade and business, out of which the written contract arises and to which it relates, and must not exist merely in the "judgment and opinion of the witnesses." (u)

The meaning of all words and terms of art, and specifications of quantity, weight, and measure, are regulated and controlled by local custom, unless the terms have been selected, and a definite meaning given to them by the legislature. (x) Evidence of general usage, in the trade to which the contract refers, is admissible to give a particular and peculiar sense to the words employed, as the parties may be presumed to have contracted in conformity with the custom, and to have used the words in their customary trade acceptance.

The memorandum of a contract of sale was in the terms following:—"Sold, Mr. W. S. 18 pockets of Kent hops, at 100s.;" and it was held that oral evidence was admissible to show that, by the usage of trade, a contract so worded was understood to mean 5l. per cwt., and that the hops consequently were to be weighed, and the price ascertained, according to the weight of the article, and that the 100s. was not to be paid per pocket, without reference to the weight of the contents of such pocket. (y)

But to vary the meaning of plain words, the existence of the custom must be "clear, cogent, and irresistible." Two witnesses stated that the usual practice of the trade to Sydney was to consider steerage passengers as "cargo," and their passage money as "freight;" but could give no instances of such construction within their own knowledge, and it was

(s) *Lethulier's case*, 2 Salk. 443. *Hutchinson v. Bowker*, 5 M. & W. 535; Domat. 36, § 9. *Scott v. Bourdillon*, 5 B. & P. 218.

(t) *The Queen v. Stoke-upon-Trent*, 13 Law J. N. S. (Q. B.) 117.

(u) *Tindal, C. J.*, 13 Law J., N. S. (C. P.) 195.

(x) *Master of St. Cross v. Ld. Howard de Walden*, 6 T. R. 338. *Hocken v. Cooke*, 4 T. R. 314, 750; 3 T. R. 271. *Taylor v. Briggs*, 2 C. & P. 525. *Mages v. Atkinson*, 2 M. & W. 440.

(y) *Spicer v. Cooper*, 1 Ad. & E. N. S. 424

held that the evidence was insufficient to establish a usage of trade, so as to vary the *prima facie* meaning of the words cargo and freight in a written contract. (2)

The cases as to the admission of oral evidence of the custom of trade, "go no further than to permit the explanation of words used in a sense different from their ordinary meaning, or the addition of known terms not inconsistent with the written contract." (a) A usage of trade can never be set up in contravention of a rule of law, or in opposition to a plain and clearly expressed intention. If there are peculiar expressions used in a contract, which have in particular places or trades a known meaning attached to them, it is for the jury to say what the meaning of these expressions was, but for the court to decide what the meaning of the contract was. (b)

The import and meaning of words at length cannot be contradicted or altered by figures. Where the figures and the words of a bill of exchange or a promissory note, for example, disagree, the courts will give force to the words at length, in preference to the figures, for the reason assigned by Marius, "because a man is more apt to commit an error with his pen in writing a figure than he is in writing a word."

A bill of exchange, by which the drawer required the acceptor to pay "two hundred pounds value received," purported by the figures at the top of the bill to be a bill for 245*l*, to which latter sum the stamp was applicable, but it was held that the value of the bill must be regulated by the words at length, and that oral evidence was inadmissible, to show that the bill was intended to be drawn for the amount indicated in figures. (c)

Construction of express warranties made on sales of goods and chattels. The nature and extent of a warranty will be regulated by the apparent intention of the parties at the time the contract was entered into. A sale note made on the purchase of a horse, described the animal as "a black gelding, about five years old, constantly driven in the plough—warranted;" and it was held, that if the word warranted had been placed at the commencement of the sentence, it would have extended to the sex and age of the horse, and his fitness for the plough; but as it concluded the sentence, it extended only to the *soundness* of the animal, the preceding sentences being merely descriptive of the horse, and of the work to which it had been accustomed. (d) So, where the seller gave the purchaser a

(2) *Lewis v. Marshall*, 13 Law J., N.S. (C. P.) 193.

(a) *Ld. Denman, C. J., Trueman v. Loder*, 11 Ad. & E. 598, 599, 596.

(b) *Parke, B. Hutchison v. Bowker*, 5 M. &

W. 542. 8 Ib. 823.

(c) *Sanderson v. Piper*, 7 Sc. 408, 415.

(d) *Richardson v. Brown*, 8 Moore, 338; 1 Bing. 344, s.c.

written receipt for the purchase-money, describing the horse as a bay gelding got by *Cheshire Cheese*, warranted sound, it was holden that the warranty was confined to the soundness of the animal, and did not extend to the description of his parentage. (*e*) And where a written receipt described the horse sold as "a grey four years' old colt, warranted sound in every respect," it was holden that the warranty did not extend to the description of the age of the animal; (*f*) and that if the parties had meant to warrant the age as well as the soundness of the colt, the words should have been, "warranted a four years' old colt, and sound (*g*) in every respect."

But the construction to be put upon contracts and representations of this description will be regulated by the surrounding circumstances of each particular case, which must be regarded, in order that the true meaning and intention of the parties may be discovered. A written description, or a positive affirmation, or statement of a fact, made by one man with a view of inducing another to make a purchase, or to enter into a contract with him, and incur a liability, which he would not have entered into or incurred, but for such representation or statement, amounts to an express warranty of the fact to the person who has acted upon the faith of it. If a man advertises a ship for sale as "a copper-fastened vessel," this description is, in contemplation of law, a warranty of the fact to a purchaser who has bought the vessel upon the faith of the representation. (*h*)

If a man affirms that he is the owner of certain goods and chattels, and that he has consequently a right to sell them, or that he hath authority from the owner to make the sale, and so induces another to purchase, the affirmation amounts to an express warranty of the fact. (*i*) If a wine-merchant affirms that his wine is in a fit and proper state to be exported to India, or if the owner of a horse affirms that the animal is quiet and free from vice, this is a warranty to the party who purchases upon the faith of the representation; (*k*) but if the statement amounts, as before-mentioned, to a description of the article, or to the ordinary praise or commendation bestowed by a tradesman on his wares and merchandise, and was not meant or understood to be a positive affirmation of the truth of the fact stated, it is not a warranty. (*l*) Thus, if the vendor of pictures describes them as the work of some particular artist deceased, it is a ques-

(*e*) *Dickenson v. Gapp*, cited 1 M. & Sc. 78.

(*f*) *Budd v. Fairmanor*, 1 M. & Sc. 74; 8 Bing. 48, s. c.

(*g*) As to what constitutes unsoundness, see *Kiddell v. Burnard*, 9 M. & W. 670.

(*h*) *Shepherd v. Kain*, 5 B. & A. 240.

(*i*) *Cross v. Gardner*, Carth. 90; 1 Show. 68; 3 Mod. 261, s. c. *Buller, J., Pasley v. Freeman*,

3 T. R. 57, 58. *Harding v. Freeman*, Sty. 310;

1 Rolle Abr. 91, pl. 7, 8. *Adamson v. Jarvis*,

4 Bing. 73; 12 Moore, 253, s. c.

(*k*) *Williamson v. Allison*, 2 East, 445;

Doug. 20, s. (n.) *Cave v. Coleman*, 3 M. & R.

2. *Wood v. Smith*, 4 C. & P. 145. *Best, C. J.,*

Jones v. Bright, 3 M. & P. 173.

(*l*) So by the civil law, "nuda lau," or

tion for a jury to determine whether this was a mere expression of opinion upon a matter concerning which the buyer was to exercise his own judgment, or whether it was intended and understood to be a warranty that the pictures were painted by the particular artist named. (*m*)

Continuing guarantees.—If a man gives a guarantee generally, for the payment of goods to be supplied to a third party, and does not restrict his liability to any definite period of time, or confine it to any one particular dealing or transaction, this is a continuing guarantee, and remains in force until it is put an end to by an express notice from the surety that he will be no longer responsible, or until it has been abandoned by consent. (*n*) If a person promises to be answerable "to the extent of 100*l*." for goods to be supplied, the guarantee continues as a standing security for that amount, and the surety is answerable for any debt not exceeding 100*l*., which may from time to time be contracted. If a party means only to be a surety for one single dealing to the extent named in the guarantee, he must take care so to limit his liability, otherwise a continuing suretyship is created to the amount specified, which remains until the surety recalls and revokes the guarantee. (*o*) If, however, the parties upon the face of the guarantee appear to contemplate one particular supply only, and not a continued course of dealing to the amount specified, then the guarantee is not a continuing security, but covers and protects only the particular transaction named. (*p*)

Wagers.—A wager is a contract founded upon mutual promises, and a mutuality of obligation, and is perfected and made binding by the bare consent of the parties. (*q*) The courts have generally set their faces as much as possible against promises of this character and description, as tending to gambling and immorality, and leading to improper inquiries; and various restraints have been imposed on certain classes of them by act of parliament. All wagers which are hurtful or injurious to the reputation or feelings of third persons, or disturb the peace of society, or which militate against morality or decency, or the sound policy of the kingdom, cannot be enforced at common law; (*r*) and wagering policies

"simplex commendatio non obligat." *Domat*. 1, p. 86.

(*m*) *Jendwine v. Slade*, 2 Esp. 572. *Lomi v. Tucker*, 4 C. & P. 15. *De Sewhanberg v. Buchanan*, 5 C. & P. 843. *Power v. Barkham*, 4 Ad. & E. 473; 6 N. & M. 62, s. c.

(*n*) *Boston v. Bennett*, 3 Campb. 220. *Hargrave v. Smees*, 3 M. & P. 584; 6 Bing. 244, s. c.

(*o*) *Merle v. Wells*, 2 Campb. 413. *Mason v. Pritchard*, ib. 436; 12 East, 227, s. c. *Allan*

v. Kenning, 2 M. & Sc. 678; 9 Bing. 618, s. c. *Mayer v. Isaac*, 6 M. & W. 605. *Martin v. Wright*, 9 Jurist, 178. *Hitchcock v. Humphrey*, 6 Sc. N. R. 549.

(*p*) *Melville v. Haydon*, 3 B. & Ald. 593. *Alderson, B.*, 6 M. & W. 612. *Smith v. Brandram*, 2 Sc. N. R. 539.

(*q*) *Jackson v. Colegrave*, Carth. 338. *Kenyon, C. J.*, 3 T. R. 704.

(*r*) *Good v. Elliott*, 3 T. R. 695, 699, 704.

of insurance, wagers on parties playing at cards, and on gambling transactions, and certain horse races, have long since been rendered illegal by express legislative enactment. (s)

A wager upon a cock or a dog-fight is void at common law, and so is a wager upon a boxing or wrestling match, or prize fight, as it tends to encourage a breach of the peace. (t) Wagers on the question of war or peace, or on the event of a criminal trial, or of an election of a member to serve in parliament, or on the life of a foreign potentate, or on the amount of hop duties, or the market price of goods at a future day, are illegal, as being either contrary to public policy, or tending to gambling. (u) And it has recently been enacted by 8 & 9 Vict. c. 109, s. 18, that "all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. But it is provided, that the enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winners of any lawful game, sport, pastime, or exercise."

SECTION III.

OF PENALTIES AND LIQUIDATED DAMAGES.

Penal obligations.—The usurers and money-lenders of times past, in order to secure the repayment of loans advanced by them, resorted to the expedient of a penal obligation. The borrower was made to bind himself to the lender in a penal sum, which was generally double the amount of

(s) 16 Car. 2, c. 7, s. 3; 9 Anne, c. 14, s. 2; 13 Geo. 2, c. 19; 18 Geo. 2, c. 34; and see post, part 2.

(t) 2 H. Bl. 43; 1 C. & P. 613; 3 C. & P.

376; 3 Campb. 140; 7 Moore, 212.

(u) See *Harrison's Index*, tit. WAGER—GAMBLING. *Evans v. Jones*, 5 M. & W. 77; 7 T. R. 535; 2 D. & R. 450.

the actual debt, to be paid on request, subject to a condition thereunder written, that if the obligee paid the principal sum borrowed, with interest, by a particular day, the bond should be void, or otherwise remain in full force and vigour. If the condition was not rigidly performed, and the money paid on the very day, and at the exact time specified, the bond became forfeited, and the whole penalty was recoverable at common law.

Such were the advantages given to usurers and extortioners by these bonds, and so great the injury and mischief occasioned to borrowers, who were often designedly prevented from complying with the strict terms of the condition, by those whose interest it was to take advantage of the forfeiture, that the Court of Chancery interposed for their relief, and would not permit the lender in any case to take more than in conscience he ought, viz. his principal, interest, and expenses. (a) An unsuccessful attempt was made in the reign of Henry VIII. to induce the judges to give relief at common law, and prevent money-lenders from recovering penalties upon bonds. Sir Thomas More, when entrusted with the great seal on the disgrace of Cardinal Wolsey, "summoned the judges to a conference concerning the granting relief at law after the forfeiture of bonds, upon payment of principal, interest, and costs; and when they said they could not relieve against the penalty, he swore by the body of God he would grant an injunction!" (b) A century and a half later, however, when the jurisdiction of the courts of equity in giving relief had become firmly established, the judges, to save the obligor the expense of going into Chancery, gradually adopted the practice of ordering the proceedings in actions commenced to recover penalties upon bonds conditioned for the payment of money, to be stayed, and the bond to be given up, on the sum named in the condition being brought into court, together with interest and costs; (c) and the legislature at length interfered to provide effectual relief against penalties incurred by the forfeiture of bonds.

By stat. 4 Ann. c. 16, it was enacted, that when an action of debt should be brought upon a money-bond, having a condition or defeazance to make void the same upon payment of a less sum at a day or place certain, if the obligor, his heirs, &c., had, before the action brought, paid to the obligee, his executors, &c., the principal and interest due by the defeazance or condition of such bond, though such payment was not strictly made according to the terms of the condition or defeazance; yet it might be pleaded in bar of such action, and should be as effectual a bar thereof as

(a) *Friend v. Burgh*, Finch, 437.

(b) Per Lord Mansfield, *Wyllie v. Wilkes*, 2 Doug. 522.

(c) *Flood v. Collett*, 2 Keb. 553. Holt, C. J.,

(9 & 10 W. 3.) cited in *Gregg's case*, 2 Salk. 597; Anon. 6 Mod. 11. *Burridge v. Fortescue*, ib. 60. *Ireland's case*, ib. 101.

if the money had been paid in strict accordance with the terms of the condition ; and that if at any time pending an action upon any such bond with a penalty, the defendant should bring into court where the action was depending, all principal money and interest due on such bond, and also all such costs as had been expended in any suit or suits in law or equity upon such bond ; the said money so brought in should be deemed and taken to be in full satisfaction and discharge of the said bond ; and the court should and might give judgment to discharge every such defendant of and from the same accordingly.

This act related simply, as previously mentioned, to common money bonds. But penalties were not confined to bonds of this description. They were gradually resorted to, to secure the performance of contracts and collateral acts ; and parties frequently bound themselves in heavy sums, to be paid in case they did not perform such and such covenants, or did, or omitted to do, certain specified acts or things. More hardship was frequently sustained from penalties of this description than from the ordinary penalty of a common money bond, for all the material parts of a contract secured by a penalty might be performed ; yet if the contract had not been literally fulfilled in every particular ; if every one of a variety of things stipulated to be done, was not done, either at the exact time, or in the exact manner, or with all the circumstances specified, according to the literal terms of the engagement, the whole penalty became forfeited, and payable at common law, although the real damage sustained by the particular breach of contract complained of, might be of the most trifling and contemptible character. Parties consequently who had incurred these forfeitures, and had become liable to the payment of these penalties, had often a strong claim in equity for relief ; and the Lord Chancellor, from a very early period, granted injunctions to restrain plaintiffs from issuing execution upon judgments obtained in the courts of common law for such penalties, and directed an issue to try, by the verdict of a jury, the amount of actual damage sustained, which damage, when assessed, the party was allowed to recover, but nothing further. (*d*)

By these proceedings of the Court of Chancery, penalties were rendered nugatory and useless.

Matters being in this state, the legislature, in order to extend to defendants in actions at law a reasonable relief and protection from penalties, and at the same time to secure to parties damnified by the breach of contract, what were considered to be their "just rights," enacted, by the

(*d*) *Tall v. Ryland*, 1 Ch. C. 183. *Hardy v. Martin*, 1 Cox, 26 ; 1 Br. C. C. 419, a. c. *Sloman v. Walters*, 1 Br. C. C. 418. *Roy v. Duke of Beaufort*, 2 Atk. 101.

statute of 8 & 9 W. 3, c. 11, s. 8, "that in all actions in any court of record upon any bond or any penal sum for non-performance of any covenants or agreements in any indenture, deed, or writing, contained the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit, and the jury, upon trial of any such action or actions, shall and may assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned as the plaintiff upon the trial of the issues shall prove to have been broken, and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions; and if judgment shall be given for the plaintiff on a demurrer, or by confession, or *nihil dicit*, the plaintiff upon the roll may suggest as many breaches of the covenants and engagements as he shall think fit, upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justices or justice of assize or nisi prius of that county, to inquire of the truth of every one of those breaches and to assess the damages that the plaintiff shall have sustained thereby . . . and in case the defendant or defendants after such judgment entered, and before any execution executed, shall pay into the court where the action shall be brought, to the use of plaintiff or plaintiffs, such damages, so to be assessed, by reason of all or any of the breaches of such covenants, together with the costs of suit, a stay of execution of such judgment shall be entered upon the record, or if by reason of any execution executed, the plaintiff or plaintiffs shall be fully paid or satisfied all such damages so to be assessed, together with his or their costs of suit, and all reasonable charges and expenses of executing the said execution, the body, lands, or goods of the defendant, shall be forthwith discharged from such execution, which shall likewise be entered upon record; but notwithstanding, in each case, such judgment shall remain, continue, and be, as a further security to answer to the plaintiff or plaintiffs his or their executors, &c., such damages as shall or may be sustained for further breach of any covenant or covenants in the same indenture, deed, or writing contained." (e)

This statute embraces all penalties established to secure the performance of contracts, and is in all cases compulsory upon plaintiffs.

Certain articles of agreement, for example, containing divers stipulations of things to be done, were entered into between the plaintiff and the de-

(e) The statute then goes on to provide a remedy by *sci. fa.* upon the judgment for the recovery of the damages arising from further

breaches. By stat. 3 & 4 W. 4. c. 42, s. 16, the jury is to appear before the sheriff instead of the justice or justices of assize.

defendant, and there was a penal clause whereby the parties became mutually bound to each other in the penal sum of 100*l.* for the performance of the articles. An action was brought for the penalty, and the plaintiff in his declaration alleged the breach of several of the stipulations entered into by the defendant, which being severally denied, issues were joined thereon, and at the trial were found for the plaintiff, and a verdict was given for him, but the jury did not assess the damages pursuant to the statute. After judgment in the Exchequer on this verdict, and a writ of error brought thereon, it was held by the Exchequer chamber that the judgment ought to be reversed, and a venire de novo awarded, and damages assessed proportioned to the actual injury sustained by the plaintiff pursuant to the statute. "It is apparent to us," observe their lordships, "that the law was made in favour of defendants, and is highly remedial, calculated to give plaintiffs relief up to the extent of the damage sustained, and to protect defendants against the payment of further sums than what were in conscience due, and also to take away the necessity of proceedings in equity to obtain relief against an unconscientious demand of the whole penalty in cases where small damages only had accrued. We are of opinion that it is not in the power of a plaintiff to refuse to proceed according to the statute, but that he must assign the breach of such covenants as he proceeds to recover the satisfaction for, and if the defendant pleads to issue, and the cause goes to a jury for trial, the jury, upon trial of such cause, must assess damages for such of the breaches assigned, as the plaintiff, upon trial of the issues, shall prove to have been broken." (f)

The statute, it will be seen, refers simply to penalties for the non-performance of contracts, and does not extend to any bond conditioned for the mere payment of money. Bail bonds, replevin bonds, post obit bonds, and all bonds conditioned for the payment of a sum certain, at a day certain, are not within the statute; (g) but bonds for the payment of annuities, and of sums of money by instalments, have been held to come within its provisions. (h)

In an action upon a bond conditioned for the performance of covenants, or collateral acts, the obligee cannot recover more damages against the

(f) *Hardy v. Bern*, 5 T. R. 686, 540. *Roles v. Rosewell*, ib. 538. *Collins v. Collins*, 2 Burr. 825. "A very beneficial remedy, and a very just one this is." Mansfield, C. J., ib.

(g) *Murray v. the Earl of Stair*, 2 B. & C. 81. *Smith v. Bond*, 3 M. & Sc 528; 10 Bing. 125, s. c. *James v. Thomas*, 5 B. & Ad. 40; 1 Saund. 58, n. (b) ed. 1845.

(h) *Collins v. Collins*, 2 Burr. 820. *Willoughby v. Swinton*, 6 East, 550. *Walcot v. Goulding*, 8 T. R. 126. A warrant of attorney conditioned for the payment of money by instalments or to secure the payment of an annuity is not within the statute. *Cox v. Rodbard*, 3 Taunt. 74. *Shaw v. Lord Worcester*, 4 M. & P. 21; 6 Bing. 385, s. c.

In cases, also, influencing and affecting the personal feelings and affections, the real injury sustained cannot easily be measured by the taste or judgment of third parties; it is often such as the persons interested can alone correctly estimate, and they may well be permitted, when that is the case, to calculate and fix them beforehand, by their agreement, at a precise sum, to be paid not by way of a penalty, but as the liquidated damage resulting from the breach of contract. If a man seals and delivers a written promise of marriage, whereby he promises to marry a particular lady, and in default to pay her the sum of 1,000*l.*, "that very sum is the ascertained damage, and the jury are confined to it." (r)

In all cases, indeed, where the damages are of an uncertain character, and not merely nominal in amount, the parties may, by their contract, assess and fix them beforehand, provided the sum stipulated to be paid as the liquidated damage for the breach of contract is confined to one single act, and is not made payable generally upon the non-performance of any one of a multitude of things stipulated to be done. In an agreement for the performance of various things on either side, there was the following clause:—"It is fully agreed that the said William Bolton shall not, either directly or indirectly, take, or be in any way concerned in carrying on, the trade of a licensed victualling house within the distance of one mile from the above house during the time that the same is occupied by the said Jethro Crisdee, or any part of his family, under the penal sum of 500*l.*, the same to be recovered as and for liquidated damages;" and it was held, that as the sum of 500*l.* was to be paid for the doing of one thing only, and did not extend to the other stipulations of the agreement, it might be recovered as liquidated damages, and that the jury, consequently, were bound to give the full amount specified. (s)

In articles of co-partnership between two coach proprietors, containing a variety of stipulations, it was provided, that in case of the dissolution of the partnership, the defendant, so long as the plaintiff continued to carry on the trade of a stage coach proprietor at Croydon, should not, during certain hours of the day, "run or use for hire any stage coach, omnibus, or other carriage, nor otherwise ply for hire on any part of the road between Croydon and London, under the penalty of 40*l.*, to be recovered by the said Thomas Leighton, his executors, &c., as and by way of liquidated damages, in an action at law," and it was held that the sum named must be taken as liquidated damages, and not as a penalty. (t)

v. *Goodson*, 8 Sc. 71. *Aldridge v. Howard*, 5 Sc. N. B. 623.

(r) *Mansfield, C. J., Lowe v. Peers*, 4 Burr. 2229.

(s) *Crisdee v. Bolton*, 3 C. & P. 240. Lord

Eldon, Astley v. Weldon, 2 B. & P. 352. *Proctor v. Sargent*, 2 Sc. N. B. 289. Equity will afford no relief in such cases, *Street v. Rigby*, 6 Ves. 818.

(t) *Leighton v. Wales*, 3 M. & W. 545, 551. *Barton v. Glover*, Holt, N. P. C. 43.

The obligee of a bond bound himself to complete certain smith's and ironmonger's work in a church in a limited time, and in default to forfeit and pay 10*l.* for every week after the expiration of the time limited for the doing thereof, until the said smith's and ironmonger's work should be completely finished; and it was held that this was a case of stipulated damages, and ought not to be considered as a penalty. "The weekly payments," observes Ashurst, J., "are in the nature of liquidated damages, and are such a kind of penalty, if they may be called by that name, as courts of equity would not relieve against. The object of the parties in naming this weekly sum was to prevent any altercation with respect to the quantum of damages which the defendant might sustain by reason of the non-performance of the contract. It would have been difficult for the jury to have ascertained what damages the defendant had really suffered by the breach of the agreement; and therefore it was proper for the contracting parties to ascertain it by their agreement. (*u*)

Penalties under the denomination of liquidated damages. Wherever, therefore, the sum is to be paid in the event of the failure of the party to perform *one single act*, it may be recovered as liquidated damages, notwithstanding the word "penalty," or "penal sum," has been used in the contract; but where, on the other hand, the forfeiture of the money will attach on a failure to perform any one or more of several acts, of various degrees of importance, the use of the term "liquidated damages" will not prevent the sum from being considered a penalty. If a contract contains stipulations for the performance of divers things, and a distinct damage is not assessed and appropriated to each, but one sum is to be paid in respect of the non-performance of the contract generally, that sum is a penalty, although the parties may choose to call it liquidated damages, and even expressly declare that it is not a penalty. "Since the stat. 8 & 9, W. 3, c. 11, parties, in framing agreements, have frequently changed the word penalty for liquidated damages, but the mere alteration of the *term* cannot alter the nature of the *thing*." If the sum, by whatsoever name called, is in point of fact "a penalty, the court will treat it as such, and the stipulation that it shall be recovered as liquidated damages will not prevent the party from insisting on the compulsory provisions of the stat. 8 & 9 W. 3, c. 11, s. 8, as to assessing the damages. (*x*) "A great deal has been said," observes Abbott, C. J., "about the different import of the words penalty and stipulated damages, but I am of opinion, and shall always hold so, until compelled by a higher authority to say otherwise, that, whether the term penalty

(*u*) *Fletcher v. Dyche*, 2 T. R. 36. *Duckworth v. Allison*, 1 M. & W. 412.

(*x*) *Littledale & Holroyd, J.'s. Davies v. Penton*, 9 D. & R. 379; 6 B. & C. 224.

or liquidated damages be used in the agreement, the party shall only be allowed to recover what damage he has really sustained." (y)

By articles of agreement between the plaintiff and defendant, the former was to pay to the latter 1*l.* 1*1s.* 6*d.* per week to perform at his theatres, with her travelling expenses of removing from one theatre to another, and the defendant was to perform at the theatres such things as she should be required by the plaintiff, to the best of her ability, the plaintiff agreeing to find proper theatrical dresses; and the defendant was also to attend at the theatre beyond the usual hours in case of emergency, and at rehearsals, or be subject to the payment of the fines and forfeitures, established in the respective theatres; also to be at the theatre half an hour before the performance began, unless permission should be obtained from the plaintiff in writing to the contrary; and to conform to the several rules and regulations of the respective theatres in every respect, and pay all fines that might become payable by means of any forfeiture or otherwise; and it was lastly agreed by both parties, "that either of them neglecting to perform that agreement, should pay to the other of them the full sum of 200*l.*:" and it was held, in an action for the recovery of this money, by reason of the defendant's having absented herself from the theatre, that the 200*l.* was a penalty, and that the plaintiff could only recover in respect of the actual damage he had sustained. "Where articles of agreement," observes Heath, J., "contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that if such a party do a particular thing such a sum shall be paid by him, there the sum stated may be treated as liquidated damages." (z) "The true effect of this agreement is to give the plaintiff his option either to proceed upon the covenants *toties quoties*, or upon the first breach to proceed at once for the 200*l.*, out of which he may be satisfied for the damage actually sustained, and which may stand as a security against future breaches."

Certain articles of agreement had been entered into between the plaintiff and the defendant for the sale and purchase of the good will of a surgeon's business, and the lease of the house in which the business was carried on, for the sum of 800*l.*, and the stock in trade and fixtures for 170*l.* 4*s.*, and by these articles of agreement, it was provided that one moiety of the 800*l.* should be paid down at the signing of the articles, and the remaining moiety thereof, and the 170*l.* 4*s.* should be paid by certain bills of exchange in manner therein mentioned, and the

(y) Abbott, C. J., *Randal v. Everest*, 1 M. & M. 41.

(z) *Astley v. Weldon*, 2 B. & P. 352, 353.

defendant then agreed to permit the plaintiff freely to exercise the business and profession of a surgeon in the house therein mentioned, and to use his best endeavours to induce his patients and friends to employ the plaintiff, and promised and agreed that he would not practise himself as a surgeon within five miles of the said house, &c., "and for the true performance of all and singular the agreements aforesaid, each of them, the defendant and plaintiff, did thereby bind and oblige himself unto the other of them in the penal sum of 500*l.*, to be recoverable for the breach of the said agreement in any court or courts of law, as and by way of liquidated damages;" and it was held that the sum named was a penalty. "Where the sum," observes Bayley, J., "which is to be a security for the performance of an agreement to do several acts, would, in some instances, be too large, and in others too small a compensation for the injury thereby occasioned, that sum is to be considered a penalty." (a)

By certain articles of agreement between the plaintiff and the defendant, the latter agreed to act as a comedian at Covent Garden Theatre for four seasons, and to conform in all things to the usual regulations of the theatre, and the plaintiff agreed to pay to the defendant the sum of 3*l.* 6*s.* 8*d.* for every night on which the theatre should be open for performance during the four seasons, and that the defendant should be allowed to have one play and one farce, to be chosen out of the common benefit list exhibited for his benefit at the said theatre, within the course of every season during the said next four seasons, on the defendant paying into the treasury the charge of 200*l.* "And it was thereby agreed between the parties aforesaid, that if either of them should in any wise omit, neglect, or refuse to fulfil, perform, or keep the said agreement, or any part thereof, or any stipulation therein contained, such party should and would pay to the other the sum of 1,000*l.*, to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal would amount, and which sum was thereby declared by the said parties to be the liquidated and ascertained amount of the said damages, and not a penalty or penal sum, or in the nature thereof;" and it was held that the sum so agreed to be paid was nevertheless a penalty, and that the parties could no more change the *thing* by changing the *name* than they could make white black by saying that it was so. "It is certainly difficult," observes Tindal, C. J., "to suppose any words more precise or explicit than those used in the agreement, the same declaring not only affirmatively that the sum of 1,000*l.* should be taken as liquidated damages, but negatively also that it should not be considered as a

(a) *Davis v. Penton*, 6 B. & C. 223 9 D. & R. 369, s. c.

penalty. . . . But the clause is not confined to any single breach where the damages would be of an uncertain nature ; . . . it extends to the breach of any stipulation by either party. If, therefore, on the one hand the plaintiff had neglected to make a single payment of 8*l.* 6*s.* 8*d.* per night, or, on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question in either case would have given the stipulated damages of 1,000*l.* But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms, the case being precisely that in which courts of equity have always relieved, and against which courts of law have also in modern times endeavoured to relieve, by directing juries to measure and assess the damages actually sustained by the breach of the agreement." (b)

By articles of agreement under seal, the defendant covenanted to demise by indenture to the plaintiff, within a given period, two messuages for the remainder of an unexpired term of two years; the indenture to contain certain specified covenants and provisos, "and all other usual and reasonable covenants;" and the plaintiff covenanted to accept such lease upon the terms specified and execute a counterpart thereof, and pay the expenses of such lease and counterpart, and of the said articles of agreement and the counterpart thereof; "and for the true performance of the agreement each of the parties bound himself unto the other in the penal sum of 500*l.*, to be recovered against the defaulter as liquidated damages;" and it was held that the 500*l.* must be considered as a penalty, for the forfeiture would not only attach on the defendant's refusal to grant the lease, but also on the plaintiff's refusal to pay the expense of preparing the lease and counterpart. "To entitle a party to recover a sum named in this manner, there must be an express appropriation of the sum to a specific breach; where it is equally applicable to the failure to perform several things of various degrees of importance and value, it can only be held a penalty." (c)

And even if the sum be made payable on the non-performance of one single act, and be restricted to a specific breach of contract, yet if it be so excessive in amount as to be altogether disproportioned to any damage that can by any possibility be sustained, that sum is in reality and in principle a penalty. To call it the "liquidated and ascertained damage

(b) Tindal, C. J., *Kemble v. Farren*, 3 M. & P. 440, 441.

(c) Coltman, J., *Boys v. Ansell*, 7 Sc. 364.

is no more," to use the words of Abbott, C. J., "than an attempt to evade the provisions of a most beneficial act of parliament, and may produce great injustice; for what can be more unconscientious than that a party who is only damnified to the extent of 5*l.* should, notwithstanding that fact, be permitted to recover 100*l.*?" (*d*) It has accordingly been laid down as a principle of law, that "wherever the payment of a smaller sum is secured by a larger, the latter must always be considered as a penalty." (*e*)

In questions influencing and affecting the personal feelings and affections and the enjoyment of property, the extent of the injury is so uncertain that a considerable latitude must and ought to be allowed to the parties in measuring it by a pecuniary standard and fixing the amount of damages; but even here there must be a limit which cannot in reason and truth be transgressed, and if the sum agreed upon plainly and palpably exceeds any injury that can by any possibility have resulted from the non-performance of the thing stipulated to be done, that sum is in reality and in principle a penalty. The *stat. Wm. 3* is, as previously mentioned, a remedial measure, intended to benefit defendants and moderate the rigour of the common law, and whenever a sum stipulated to be paid as a compensation for a breach of contract, far transcends anything that can reasonably be called a compensation, the defendant, who is called upon to pay the unconscionable demand, is justly entitled to the relief intended to be provided by the legislature.

The French law, respecting the reduction and apportionment of penalties, is not unworthy of attention. Pothier, in his *Treatise on the Law of Obligations*, after telling us that, "*la peine stipulé en cas d'inexécution d'une obligation peut, lorsqu'elle est excessive, être réduit et modéré par le juge,*" (*f*) remarks, that although a penalty or sum *in solido* is agreed to be paid for the very purpose of avoiding a discussion as to the amount of damages that have been sustained, yet being stipulated in lieu of damages, it is contrary to its nature to be carried beyond the limits which the law respecting damages prescribes, and as the (*French*) law does not permit them to exceed double the value of the subject matter of the contract, the judge ought to moderate an excessive penalty to which the one party has inconsiderately submitted, when the other has suffered no real injury, or one much below the amount stipulated to be paid. The party making default cannot

(*d*) Abbott, C. J., *Pinkerton v. Caslon*, 2 B. & Ald. 706.

(*e*) *Chambre, J., Astley v. Weldon*, 2 B. &

P. 354.

(*f*) *Pothier*, part 2, ch. 5, cinquième principe, ed. *Dupin* 1, p. 191.

certainly, he observes, however excessive the sum agreed to be paid may be, dispute his having intended to oblige himself to the extent named, when the clause of the contract is express to that effect, for *ubi est evidens voluntas, non relinquitur præsumptioni locus*; but he may have entered into the contract, in the first instance, with the most perfect honesty of intention, and a firm determination to carry it fully and completely into effect, but *with an erroneous confidence in his own powers of performance, and the equity which ought to prevail in all mutual contracts entered into for the common benefit of both parties, does not permit the one to make a profit* and unconscientiously to enrich himself at the expense of the other. An excessive penalty or fixed sum, agreed to be paid in lieu of damages, ought therefore, he says, to be reduced to what the damages, resulting from the non-performance of the contract, amount to at the very highest. (g) If again, he observes, a penalty has been imposed, or a sum *in solido* agreed to be paid as the ascertained damage, resulting from a breach of contract, and such contract has been partially performed, the party ought not to receive the whole penalty, “la peine n'est due qu'à proportion, et quant à la parte pour laquelle l'obligation principale n'est pas exécuté.” Ulpian decides that, although in strictness of law, the whole penalty has been incurred; nevertheless it is equitable that it should be so, only in proportion to the part of the principal obligation which remains to be performed, the true reason being that the penalty or liquidated sum being considered as a compensation for the non-performance of the principal obligation, the party seeking to enforce the contract cannot have both the one and the other. In omnibus, sive individuis, sive dividuis, pœna non committitur, nisi pro parte contraventionis efficacia, nec potest exigi cum principali; sed creditor non tenetur partem principalis, et partem pœnæ accipere. (h)

(g) Cette décision doit avoir lieu dans les contrats commutatifs, parce que l'équité, qui doit régner dans ces contrats, ne permettant pas que l'une des parties profite et s'enrichisse aux dépens de l'autre, il serait contraire à cette équité que le créancier s'enrichisse aux dépens du

débiteur, en exigeant de lui une peine trop excessive et trop manifestement au dessus de ce qu'il a souffert de l'inexécution de l'obligation primitive. p. 192.

(h) Dumoulin de divid. et individ., p. 3, n. 112.

CHAPTER VI.

OF CONDITIONS PRECEDENT TO THE RIGHT OF ACTION EX CONTRACTU.

SECTION I.—Deeds.—Of conditional and qualified obligations and covenants—Mutual covenants *inter partes*—Contracts under seal founded upon a mutuality of obligation—When the entire performance of a covenant on the one side is a condition precedent to any liability on the other—Covenants for the performance of divers acts and duties—When they are divisible and apportionable—Effect of part performance and of failure in the full and literal performance of them—Time the essence of the contract in what cases.

SECTION II. Simple contracts.—The bonâ fide performance of an act forming the consideration for a promise, a condition precedent to the right of action upon such promise—Effect of a defective and insufficient performance of the consideration—If no beneficial service no pay—When the consideration is entire and indivisible, and the entire performance of it is a condition precedent—When it is divisible and apportionable, and a part performance of it will sustain an action—Proportional abatement of the claim and of the correspondent liability in such a case.

SECTION III. Of mutual conditions, and dependent and independent covenants and promises.—Of the time and manner of performance of mutual conditions and concurrent acts—Accomplishment of a condition by construction of law when its fulfilment in fact has been wrongfully prevented.

SECTION I.

OF CONDITIONS PRECEDENT TO THE RIGHT OF ACTION UPON DEEDS.

Of conditional and qualified obligations.—An obligation by deed is sometimes absolute, the mere fact of the obligation appearing without any disclosure of surrounding circumstances, and sometimes qualified and

conditional, being dependent upon the happening of some event, or upon the performance of some prior or precedent act.

If a man covenants with a builder to pay him a certain portion of the contract price for a building, on receiving an architect's certificate of the approval of the work, the production of the certificate is a condition precedent to the builder's right of action for the money. (a) If a man covenants to spend a sum of money in the alteration and improvement of a house, under the direction of a surveyor, to be appointed by the covenantee, the appointment of the surveyor is a condition precedent to the covenantor's liability to expend the money. (b) If, by a charter party of affreightment, a shipowner agrees that his ship shall sail to a "safe port," to take in a cargo, the naming of a "safe port," is a condition precedent to the shipowner's liability to send out the vessel. (c) If the shipowner agrees that the vessel shall leave England on or before a particular day to bring back a cargo from a foreign port, the departure of the vessel at the time specified is a condition precedent to the freighter's liability to provide the cargo, and use the ship, and pay freight. (d)

If, by the terms of an obligation under seal, it appears that the performance of some act by the obligee forms the groundwork or consideration for the obligation, the contract is conditional and qualified, and the liability upon it does not arise until the event has happened, or the precedent act has been performed. If the obligor, for example, binds himself to pay money, or to do certain things in consideration of a release from a debt, or other cause of action, to be granted him by the obligee, the execution of the release is a condition precedent to the obligor's liability upon the contract. If, upon the face of a deed poll, it appears that a sum of money is to be paid as the price of an article purchased of the obligee by the obligor, the liability of the latter upon the obligation is suspended until the subject matter of the sale has been delivered or tendered. (e) If the grant or conveyance of some estate or interest appears upon the face of a deed *inter partes*, to have formed the consideration or inducement for a covenant therein contained, the liability upon the covenant is dependent upon the passing of the estate or interest purported to be conveyed. Thus, where the plaintiffs pretending to have an exclusive right to a particular machine under a patent assigned part of that right to the defendant, and the latter covenanted not to use any

(a) *Morgan v. Birnie*, 3 M. & Sc. 79; 9 Bing. 672, s. c.

(b) *Coombe v. Green*, 11 M. & W. 480.

(c) *Ras v. Hackett*, 13 Law J. N. S. (Excheq.) 216.

(d) *Graham v. Hays*, 2 Sc. N. B. 471. *Shadforth v. Higgin*, 3 Campb. 385. *Lovatt v. Hamilton*, 5 M. & W. 644.

(e) *Lock v. Wright*, 1 Str. 571; 8 Mod. 41, s. c. *Ughtred's case*, 7 Co. 10 b.

other patent machine in his factory, and afterwards it was discovered that there was no such patent right, but that the defendant and everybody else might have used the machine without the license of the plaintiffs; it was held that the defendant was not bound by his covenant. (f) If a lease be agreed upon, and the lessor does not execute his part, so that the term of years in the land bargained for is not created and transferred to the intended lessee, the covenants in the indenture, sealed by the latter, cannot be enforced, for "the foundation of the covenant failing, the covenant also fails." (g) If, however, the intended lessee has entered into possession of the land, and has had the use and enjoyment of the premises intended to have been demised to him, during the time that the breaches of covenant were committed, he will not be permitted to rely on the non-execution of the lease by the intended lessor as releasing him from liability; but he is bound to fulfil his covenant as an independent covenant. (h)

If several persons covenant to abide by and perform an award, and the award when made turns out to be void, all the covenants dependent upon the award are so too; "for the foundation failing, everything built thereon must fall." (i)

When a covenant is founded upon a common liability, to be created by a deed *inter partes*, the contract must be executed by all the parties before any one of them can be made liable upon it. Thus, if a deed of submission of disputes and differences to arbitration does not bind all the parties thereto, it does not bind any, as the mutuality of engagement is the essence of the contract. "There must be the accession of all parties to the common agreement of all which is the consideration to each for entering into the contract," (k) and if a submission to arbitration, originally binding on all, becomes ineffectual and inoperative as to one by matter *ex post facto*, such as bankruptcy or insolvency, the deed is wholly and altogether void. (l)

The defendant being possessed of a large stock in trade, covenanted with the plaintiff to assign the same to him, and another person at the end of a twelvemonth at a fair valuation, and the plaintiff covenanted

(f) *Hayne v. Maitby*, 3 T. R. 442. *Chanter v. Leese*, 4 M. & W. 311.

(g) Com. Dig. Cov. F., *Cardwell v. Lucas*, 2 M. & W. 111.

(h) Bayley, J., *Hodson v. Sharpe*, 10 East, 354; Shep. Touch. ch. 54, p. 8. *Cooch v. Goodman*, 2 Ad. & E. N. S. 580; 2 Gale & Dav. 164. *Fishmongers Co. v. Robertson*, 6 Sc. N. R. 56. *Doe v. Amy*, 12 Ad. & E. 479.

Pistor v. Cater, 9 M. & W. 320. *Chanter v. Dewhurst*, 13 Law J. N. S. (Excheq.) 198.

(i) *Johnston v. Wilson*, 7 Mod. 345; Willes, 248, s. c.

(k) Ellenborough, C. J., *Antram v. Chace*, 15 East, 212. *Ferrer v. Owen*, 7 B. & C. 427. *Marsh v. Wood*, 9 B. & C. 665.

(l) *Kearsey v. Carstairs*, 2 B. & Ad. 726.

that he would, at and before the sealing and delivery of the deeds, procure good and sufficient security, to be given to the defendant to be approved of by the defendant for the payment of a certain stipulated sum by monthly instalments, and the plaintiff brought an action against the defendant for a breach of his covenant to assign the stock in trade without having first performed his own covenant to procure the security; it was held that the giving of the security was necessarily a condition precedent to the defendant's liability upon his covenant, and that the plaintiff consequently could not maintain his action. (m)

By a charter party of affreightment, the freighter covenanted to pay freight for a vessel at so much a ton per month, until her final discharge, or until the day of her being lost, captured, or last seen, or heard of; so much of such freight as might be earned at the time of the arrival of the ship at her first destined port abroad, to be paid within ten days next after her arrival there, and the remainder of the freight at specific periods; and it was held that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover *any* freight, and that the ship having been lost on her outward voyage, the owner was not entitled to recover freight at so much per calendar month to the day of the loss. (n)

Effect of part performance.—When mutual and reciprocal covenants have been entered into in an indenture *inter partes*, and it is to be collected from the face of the deed and the nature and true intent of the transaction itself, that the entire covenant is to be performed on the one side before any liability is to arise on the other, a partial performance will not of course suffice to sustain the action, although the defendant has had the benefit thereof.

The defendant had covenanted to take the plaintiff as his clerk, and pay him 2s. for every quire of paper he should copy out; and it was held that this was an entire covenant of which no apportionment could be made *pro rata*, and that the plaintiff consequently could not maintain an action for copying out any number of sheets less than a quire." (o)

Certain articles of agreement under seal recited that the plaintiff had established a grammar school, and had obtained a piece of ground whereon he had erected a building appropriated to instruction, &c., and that he had agreed with the defendant to sell to him his right, title, and interest in the ground and building, and to surrender to him the pupils he then

(m) *Kingston v. Preston*, cited in *Jones v. Barkley*, 2 Doug. 689.

(n) *Gibbon v. Mendes*, 2 B. & A. 17. *Smith*

v. Wilson, 8 East, 437. *Byrne v. Pattinson*, Abbot on Shipping, 347.

(o) *Needler v. Guest*, Ayley. 9.

had under his care, for the considerations thereafter mentioned, and the plaintiff then covenanted to surrender up to the defendant the use and enjoyment of the school-house and premises, and deliver over to the defendant all the pupils then under his, the plaintiff's care, and all the profits arising from them, on or before the 29th of June, 1796, and to convey all his right, title, and interest in the school-house, land, and premises to the defendant, on or before the 1st of August, 1797; and the defendant, in consideration thereof, covenanted to pay to the plaintiff, on or before the said 1st of August, the sum of 120*l.*, with interest. The plaintiff accordingly put the defendant into possession of the school-house, land, and pupils, pursuant to the agreement; and the latter continued in the enjoyment of them up to the said 1st of August, when the plaintiff brought an action for the 120*l.*, without having first executed or tendered a conveyance of his estate and interest therein; and it was held that the performance of the entire contract on the one side was a condition precedent to the liability on the other, and that the surrender to the defendant of the school-house and pupils, without the conveyance specified, and consequently without any title, was not a sufficient performance of the contract by the plaintiff to enable him to maintain the action. (*p*)

So, where the plaintiff covenanted to sell, and the defendant to purchase, an estate of the plaintiff, the conveyance to be executed and the purchase-money to be paid on Lady Day then next; and all timber trees, elms and willow trees, then growing upon the estate, to be valued and paid for by the purchaser; and after the execution of the contract, and before Lady Day, the plaintiff cut down the trees, and the defendant refused to pay the purchase-money at the time appointed; it was held that this was an entire contract for the sale of the land *and trees*; that the defendant was not bound to take the estate without the timber, and that his liability upon the covenant was conditional, and dependent upon the transfer to him of the subject matter of the sale, in the same state and condition as it existed at the time he bargained for it. (*q*) But if the precedent act to be performed is divisible and apportionable, and a partial performance is not inconsistent with the terms of the contract, the plaintiff will be entitled to maintain an action in respect of a partial performance, the defendant having a remedy by means of a cross action for the recovery of such damages as he may have sustained by reason of the non-performance of the entire contract. Thus, where the master of a ship covenanted to take out 280 passengers to Jamaica, and the defendant co-

(*p*) *Glazebrook v. Woodrow*, 8 T. R. 366.

(*q*) *Duke of St. Albans v. Shore*, 1 H. Bl. 271.

venanted to have them ready for shipment, and to pay 5*l.* a man for their conveyance, and the plaintiff only took and carried 180 of them, it was held that the latter was entitled to maintain an action in respect of his partial performance of the contract. (r)

Covenants for the performance of several acts and duties.—And when the one party has covenanted for the performance of several acts, and the other for the payment of a certain stipulated remuneration, and the acts remaining unperformed do not constitute part of the essence of the engagement, the covenant in respect thereof is not a condition precedent. It is sufficient if the act forming the substantial consideration, or inducement for the contract, has been performed, unless the intention of the parties that every minute thing stipulated to be done on the one side is strictly and literally to be completed before any liability is to arise on the other be clearly and unequivocally expressed. “In some cases in the books respecting conditions precedent, when the thing agreed to be done was in effect performed, though not in the exact manner, nor with all the circumstances mentioned, it was deemed a substantial performance,” (s) and the right of action was held to have accrued. And the nature and extent of the liability upon all covenants *inter partes* is now regulated by a fair construction of the whole deed, and “the reason and good sense of the case,” and is not made to depend, as in ancient times, upon niceties and technicalities of language.

By an agreement under seal, reciting that the plaintiff had obtained a patent for an improved method of cleaning and bleaching, and that the defendant was desirous of bleaching materials for paper-making, according to the specification of the patent; and that it had been agreed, that in consideration of 500*l.* to be paid by the defendant to the plaintiff, the plaintiff should instruct the defendant in bleaching, &c., and should permit the defendant to bleach, &c. according to the said specification, the plaintiff covenanted, in consideration of 250*l.* paid down, and a covenant by the defendant thereafter contained, to pay the further sum of 250*l.*, that he would, to the best of his skill, and with all possible expedition, instruct the defendant in the method of bleaching, &c.; and the defendant, in consideration of the plaintiff's covenants, covenanted that he would, on or before the 25th February, 1794, or sooner, in case the plaintiff should before that time have sufficiently taught and instructed him in the bleaching and preparing materials for making paper, &c., pay to the plaintiff the further sum of 250*l.*; and it was held, in an action for the breach of this

(r) *Tolson v. Noel*, 1 Lev. 16; 1 Keb. 100,
s. c.

(s) *Lawrence, J., Worsley v. Wood*, 6 T. R.
722.

last covenant, that the substantial consideration for such covenant was the transfer to the defendant of the patent right of bleaching, according to the specification of the patent, which specification must be supposed to contain full instruction for the exercise of the patent right, and that the teaching of the defendant personally by the plaintiff was not, under the circumstances, a condition precedent to his right to recover the 250*l.* (t)

The plaintiff, in consideration of 500*l.* in hand paid, and an annuity of 160*l.* per annum thereafter to be paid, conveyed to the defendant a plantation in the West Indies, together with the stock of negroes upon it, and covenanted that he had a good title to the plantation, and that he was lawfully possessed of the negroes; and the defendant covenanted that the plaintiff, well and truly performing all and everything contained on his part to be performed, he the defendant would pay the annuity. The plaintiff brought his action for the breach of the defendant's covenant, and the latter pleaded that the plaintiff was not legally possessed of the negroes; but it was held, that as the breach went only to a part of the consideration, and might be paid for in damages, the defendant should not rely on the performance of the entire covenant as a condition precedent, Lord Mansfield observing, that if the plea were to be allowed, any one negro not being the property of the plaintiff would bar the action. (u)

By the recitals of an indenture *inter partes* between a wife and her second husband, and two trustees, it appeared that the wife and the trustees were bound by the will of the wife's first husband to surrender a farm to the testator's son, in case the wife married again, on the son's giving security for the payment to her of an annuity for her life; that in consequence of the second marriage, the son had demanded the farm, and tendered sureties for the payment of the annuity; and the lady and her second husband and trustees had "mutually consented and agreed to his request; and it was witnessed therefore by the deed that the sureties, in consideration of the covenants thereafter to be entered into by the wife and her second husband and trustees, covenanted for the due payment of the annuity. These covenants so to be entered into were covenants by the wife and her second husband and the trustees, for the quiet enjoyment of the farm by the testator's son, and for the execution of a formal assignment of the lease thereof to him, whenever they should be called upon so to do. The wife and second husband and trustees, however, neglected to execute the deed, and these covenants consequently were never entered into; and an

(t) *Campbell v. Jones*, 6 T. R. 573; *Le Blanc, J.*, 8 T. R. 375. *Carpenter v. Creswell*, 1 M. & P. 77.

(u) *Boone v. Eyre*, 1 H. Bl. 273. (n.) *Le Blanc, J.*, 8 T. R. 375. *Littledale, J.*, 4 Ad. & E. 605.

action having been brought against the sureties because of the non-payment of the annuity, it was contended that such action could not be maintained, on the ground that the making of these covenants was a condition precedent to their liability to pay the annuity; but the court held, that the substantial consideration was the agreement to surrender the farm, and that the action consequently was maintainable. (x) The son's title, it will be observed, was derived from the will; he had been put in possession of the farm, and his right to the property and enjoyment thereof could not materially be affected by the execution or non-execution of the deed. The case, therefore, is distinguishable from the previous case of *Glazebrook v. Woodrow*. (y)

By an indenture *inter partes*, the plaintiff, a fish-factor, in consideration of the covenants thereafter entered into by the defendant, a fishmonger, sold and assigned to the latter all that branch of his, the plaintiff's, trade, which consisted in the sale, &c. of dried and cured fish, and also his interest in certain fisheries in Scotland; and covenanted with the defendant that he would not in any manner interfere with that branch of the business so assigned; and the defendant covenanted, that in consideration of the assignments and covenants so made and entered into by the plaintiff, he, the defendant, would pay him an annuity of 250*l.*; and it was held, in an action for the non-payment of the annuity, that the plaintiff's covenant not to interfere with the trade assigned could not be considered as a condition precedent to his right to recover, as it formed only a part of the consideration for the annuity, the material part of the consideration being the assignment of the fisheries. (z)

By a charter party of affreightment, the plaintiff let his vessel to freight to the defendant, and covenanted that the vessel should sail with the *next* wind on a voyage to Cadiz; and the defendant covenanted, that if the ship went the intended voyage and returned to the Downs, that the plaintiff should have so much by way of freight for the voyage. The defendant traversed that the ship sailed with the next wind, and upon demurrer the traverse was overruled, for the substance of the covenant was considered to be, that the ship should perform the intended voyage, that being the primary intention of the parties, and not merely that she should sail with the next wind, which might change every hour, and that this was shown by the covenant of the defendant, who was to pay so much for the performance of the voyage, and not merely for sailing with the next wind. (a) So, where the covenant was that the vessel should proceed with the *first*

(x) *Rose v. Poulton*, 2 B. & Ad. p. 822.

Bing. 409, s. c.

(y) *Ante*, p. 187.

(z) *Carpenter v. Creswell*, 1 M. & P. 66; 4

(a) *Constable v. Cloderie*, Palm. 397. *Bornmann v. Tooke*, 1 Campb. 377.

convoy to Spain and Portugal, and there make a delivery of the cargo, &c. ; in consideration whereof, and of everything above-mentioned, the defendant covenanted to pay freight, it was held, that the main object of the contract was the performance of the voyage, and that the sailing with the first convoy was not a condition precedent to the plaintiff's right to recover freight for the voyage actually performed, but a distinct covenant, for the breach of which he was liable in damages. (b) So, where the substance of the covenant was, that the ship should sail on freight to Demerara on or before the *12th of February*, and the vessel did not sail until the *12th of March*, Lawrence, J. held, that as the voyage had been actually performed, and the cargo conveyed to the destined port, and the profit of it gained by the defendant, there could be no foundation for saying that the defendant should not pay the freight for it according to the covenant, and that he might bring a cross-action to recover damages for the not sailing in time, if he had sustained any. (c) And where the plaintiff let his vessel to the defendant, and covenanted *forthwith* to make her tight, staunch, and strong, and well and sufficiently manned and victualled, &c. for a twelvemonth's voyage, and the defendant covenanted to pay freight so much per ton per month, and the vessel was taken into the service of the defendants, who used her for several months, and then refused to fulfil their covenant to pay freight, on the ground that the plaintiff had not manned and victualled the ship, and made her tight and strong, according to his covenant ; it was held, that as the defendant had not repudiated the ship because she was not forthwith made tight, staunch, and strong, but had taken her into their service, and navigated her, they had no right to insist that the forthwith making her tight, &c., was a condition precedent to their own liability upon the covenant. (d)

The plaintiff, a shipowner, covenanted by charter party, to let his ship to freight to the defendants, and take on board such cargo as the defendants should provide, and proceed therewith from London to Naples, and make a right and true delivery thereof to the agents of the defendants, and having so done, receive on board such a return cargo as the defendant's agents should provide, and proceed back to London, and the defendants, in consideration of the premises, covenanted that they would provide a complete homeward cargo and pay freight, and it appeared that the plaintiff had received the cargo and proceeded with it to Naples, where it was seized by the Neapolitan Government, so that the material part of the

(b) *Davidson v. Gwynne*, 12 East, 380.
(c) *Hall v. Cazenove*, 4 East, 476.

(d) *Havelock v. Geddes*, 10 East, 584.

covenant, *viz.* the letting of the ship, and the making of the voyage, had been performed, it was holden that the delivery of the cargo was not, under the circumstances, a condition precedent to the freighter's liability upon their covenant, to provide the return cargo and pay the freight. (e)

So, where the plaintiffs let a ship to the defendants, and covenanted to take on board at Havre six pipes of brandy, with such other goods as the captain might procure on freight, and proceed therewith to Terceira, and there take on board a full and complete cargo of fruit or other goods as the defendants might think fit, and proceed therewith to London, and the defendants, in consideration of the completion of the voyage, covenanted to pay freight, and guaranteed the ship a complete cargo home, and it appeared that the voyage to Terceira had been performed, and that the ship was ready to receive the return cargo at that place, pursuant to the charter party; it was held, that the covenant relating to the taking on board the brandy at Havre and carrying it to Terceira, was not a condition precedent to the liability of the defendants upon their covenant to provide the homeward cargo, but a distinct and independent covenant, for the breach of which they were liable in damages. (f)

By a contract under seal, between the plaintiff as captain and the defendants, the owners of a South Sea whaler, the plaintiff covenanted that he would take the command of the ship and proceed in her, as soon as she was ready for sea, to the southern whale fishery, and procure a cargo of sperm oil, ambergris, &c., and return with the ship to London, and deliver the cargo to the defendants, and that he would obey the defendant's instructions, be frugal with the ship's stores, and keep an account of the expenditure; that he would not smuggle or trade, nor suffer any illegal act to be committed, whereby the owners might be injured. And the defendants covenanted "on the performance of the before-mentioned terms and conditions" by the plaintiff, to pay to the plaintiff one-twelfth part of the net proceeds of the cargo, and the plaintiff had taken the command of the vessel and performed the intended voyage, it was held that the performance of the several other acts covenanted to be done by the plaintiff, was not a condition precedent to his right to sue for the stipulated remuneration. It was observed that if the various other covenants were treated as conditions precedent the non-performance of them in any minute particular would deprive the plaintiff of all remuneration for a long and laborious service, whilst a very trifling injury might result therefrom to the defendants. (g)

(e) *Storer v. Gordon*, 3 M. & S. 308.

(g) *Stavers v. Curling*, 3 Sc. 740, 756; 3

(f) *Fothergill v. Walton*, 8 Taunt. 576; 2 Bing. N. S. 355, a. c.

Moore, 630, a. c.

SECTION II.

OF CONDITIONS PRECEDENT TO THE RIGHT OF ACTION UPON SIMPLE CONTRACTS.

Of the performance of the CONSIDERATION for a SIMPLE CONTRACT.—

"If in the middle of a bought and sold note for a cargo of corn or any other goods, are the words 'to be delivered on or before' such a day, they will be found to amount to a condition precedent, and the purchaser will not be bound to accept the cargo if it is not ready for delivery by the time appointed." (h) If a contract is entered into for work and labour on the one side, and payment for the work on the other, the performance of the work is a condition precedent to the payment, so that the plaintiff must of necessity show the work done, or that he was hindered from doing it by the plaintiff, before he can demand the money. (i)

"Suppose an agreement to be in writing thus, 'Memorand. that J. S. agrees and promises to build a house for J. N., and J. N. promises to pay him so much for his pains;' it cannot be taken but that the building must be precedent to the payment." (k)

Defective and insufficient performance of the consideration—No beneficial service, no pay.—If a person undertakes a work of labour and skill and fails in the performance of it, so that the employer derives no benefit or advantage from the work, no right of action arises in respect thereof, the employer not having obtained that which he bargained for. Thus, where a man undertook to erect a stove in a shop, and to lay a tube under the floor, which would carry off the smoke, and the plan entirely failed, and the stove could not be used, it was holden, that he was not entitled to an action in respect of his work and labour in the erection of the stove. In such a case, observes Lord Ellenborough, "if there has been no beneficial service there shall be no pay." (l)

A builder contracted with the defendant to rebuild the front of his house, and built it out of the perpendicular, so that it was in danger of

(A) Tindal, C. J., 2 Sc. N. R. 183, *Startup v. Macdonald*, ib. 485.

(B) Holt, C. J., *Thorpe v. Thorpe*, 1 Salk. 171. *Lancashire v. Killingworth*, 1 Com. 117. Le Blanc, J., 4 T. R. 764. *Collins v. Gibbs*, 2

Burr. 899.

(C) Hale, C. J., *Peters v. Opie*, 1 Vent. 177.

(D) *Duncan v. Blundell*, 3 Stark. 6. *Duffit v. James*, cited 7 East, 481. *Hayelden v. Staff*, 5 Ad. & E. 161.

falling, and required to be taken down ; and it was holden, that the builder could not maintain any action in respect of such defective execution of the work. (m) "If a man has contracted with another to build him a house for a certain sum, it would not be sufficient for him to show that he had put together such a quantity of brick and mortar, he ought to be prepared to show that he had done the stipulated work according to the contract. And it is open to the defendant to prove that it was executed in such a manner as to be of no value to him." (n) If a surveyor makes an estimate of the expense of certain works, which turns out to be incorrect to a very considerable extent, either from negligence or want of skill, he is not entitled to recover anything for his plans, specifications, or estimates. "The just value of the services may be appreciated, and if they have been found wholly abortive, or the defendant has suffered an injury, instead of deriving a benefit from them, the party rendering such abortive services is entitled to no compensation for his trouble." (o)

If an attorney, conducting a suit, is guilty of misconduct and negligence, by reason whereof all the previous steps taken in the cause become useless, he cannot recover his charges for any part of the business he has done. (p)

When the consideration for a simple contract is entire and indivisible.—If the consideration and precedent act to be performed be entire and indivisible, and it appears to have been the intention of the parties that the whole of what the plaintiff had undertaken to perform, should be done before any liability should arise on the part of the defendant, the plaintiff cannot, so long as the contract remains open and unrescinded, maintain an action in respect of a partial execution thereof, although the defendant may have derived some benefit and advantage therefrom. As if a coachman were to agree to convey a passenger from London to York for a certain stipulated remuneration, and were to carry him only half the distance, he would not be entitled to any payment, the precedent act to be performed being entire and indivisible.

The plaintiffs had undertaken to make "complete" certain dilapidated chandeliers for the sum of 10*l.*, and took them away and cleaned them, and added certain glass drops, icicles, and spangles, but returned the articles in an imperfect and incomplete state, with some of the branches broken, and the jury found that the plaintiffs had not fulfilled their part of the contract, but that the defendants had been benefited to the amount

(m) *Farnsworth v. Garrard*, 1 Campb. 38.

352 ; 2 C. & P. 378, s. c. *Denew v. Doverell*,

(n) *Le Blanc, J., Basten v. Butter*, 7 East,

3 Campb. 352.

484.

(p) *Bracey v. Carter*, 12 Ad. & E. 373.

(o) *Money Penny v. Hartland*, 1 C. & P.

of 5*l.* by the partial execution of it; the court held, that the contract and consideration were entire, and as the plaintiffs had never been discharged from their liability to complete the contract, they could not maintain an action in respect of the partial execution of it. "The plaintiffs," observed Bayley, J., "entered into an entire contract. They performed it in part, but they failed to complete it. It was their duty to perform the contract altogether or to demand back the articles they had supplied in the part performance of it. They did neither, therefore they have no right to recover at all." (q)

A half-furnished house was demised to a tenant at a rent of 170*l.* per annum, upon the terms that the landlord should completely furnish it in a manner suitable for a ladies' school; and it was held, that the furnishing of the house by the landlord; in the manner agreed upon, was a condition precedent to his right to recover the rent. (r)

An action of debt was brought upon a note in writing, whereby the defendant's testator had appointed the plaintiff's testator to receive his rents, and promised to pay him 100*l.* per annum for his services; and the plaintiff showed that the defendant's testator died three quarters of a year after, during which time he served him and demanded 75*l.* for the three quarters; after judgment for the plaintiff in the Common Pleas, the defendant brought a writ of error; and it was held, that without a full year's service nothing could be due, for that it was in the nature of a condition precedent; that it being one consideration and one debt, it could not be divided. (s) The owner of a ship, by a note in writing, promised to pay a sailor thirty guineas, provided he continued, and did his duty as second mate on board for the voyage, and the sailor died before the completion of the voyage; and it was held, that the contract was indivisible, and the entire performance of it a condition precedent; that the deceased sailor was, by the terms of the contract, to perform a given duty before he could call upon the defendant to pay him anything, and that, as he was prevented by death from performing it, his representatives were not entitled to recover the money, nor any proportionate part thereof. (t) So, where a sailor was prevented by the loss of the ship during the voyage, from performing the stipulated consideration, which was entire and indivisible; it was held, that he was not entitled to recover a proportionate remuneration, in respect of the work and services he

(q) *Sinclair v. Bowles*, 4 M. & R. 8; 9 B. & C. 94, a. c. *Ellis v. Hamlen*, 3 Taunt. 52. *Guy v. Gower*, 2 Marsh. 276.

(r) *Machelon v. Wallace*, 7 Ad. & E. 54, n. (b).

(s) *Countess of Plymouth v. Throgmorton*, 3 Mod. 153; Salk. 65, a. c. cited by Lawrence, J., 6 T. R. 326.

(t) *Cutler v. Powell*, 6 T. R. 325.

had actually rendered. (u) And where a printer had agreed to print a certain number of copies of a book, and part of the impression was consumed by a fire which broke out on his premises; it was held, that he was not entitled to any remuneration for his work and labour, as the contract was entire, and the working off the stipulated number of copies, and the completion of them ready for delivery a condition precedent to his right to demand payment. (x)

The plaintiff offered to cure a flock of sheep and lambs, consisting of three hundred and fifty sheep, and one hundred and forty-seven lambs, of a disease called the scab, at so much per head for the sheep, and so much for the lambs, and stated that he did not expect to be paid unless he cured *all* the sheep and lambs; whereupon the defendant accepted his offer, and agreed to employ him; and the plaintiff, after he had materially checked the complaint, but before he had entirely subdued it, brought his action for the money; and it appearing that *forty* out of the flock were not cured, it was held that he was not entitled to recover anything for his pains. (y)

The defendant had agreed to purchase of the plaintiff the lease of a farm for 500*l.*, and to take the fixtures in the farm-house, together with the growing crops, at a valuation. He paid a deposit of 20*l.* per cent. upon the purchase-money, and was let into possession, and the fixtures and crops were valued to him at 1,200*l.*, but a good title not being made, he refused to pay any part of this sum, or the remainder of the purchase-money, and the action being brought to recover the value of the crops and fixtures, it was held that it was not competent for the plaintiff to separate them from the lease; that it was with a view to the one that the defendant had agreed to take the other, and the contract, therefore, was entire and indivisible, and must be fully performed by the plaintiff before he could have any right to sue the defendant. (z)

When the consideration is divisible and apportionable, and a part performance of it will sustain an action. But if the thing to be done be in its nature divisible and apportionable, and there be nothing in the terms of the special agreement which, either by express stipulation or necessary intendment, precludes the plaintiff from recovering in respect of a partial execution of it, the plaintiff may, on the performing a part only of his engagement, require a corresponding part performance on the part of the defendant. Thus, where a ship outward bound with goods, being damaged at sea, put into a harbour to receive some repairs, and an agreement was

(u) *Appleby v. Dods*, 8 East, 299.

(x) *Gillett v. Mawman*, 1 Taunt. 137. *Adlard v. Booth*, 7 C. & P. 108; and see 1 Saund.

320, b.

(y) *Bates v. Hudson*, 6 D. & R. 3.

(z) *Neal v. Viney*, 1 Camp. 471. *Lovatt v.*

made with a shipwright to put her "into thorough repair," but nothing was said as to the amount, or time or mode of payment, and before the repairs were completed the shipwright struck work, and demanded payment for what he had done, and brought his action in respect thereof, although the repairs were unfinished and incomplete; it was held that the contract was not an entire contract to do the whole of the repairs and make no demand for payment until they were completed, but that the shipwright might from time to time, in the course of the work, demand payment for what he had done, before proceeding to complete the residue. (a) And if, in a contract of this description, the defendant is deprived, by accident, of the benefit of the work before it is finished, the workman is not, by reason of such accident, deprived of his right to remuneration. Thus, where the owner of a ship having hired a dock of a shipwright, and put his ship into the dock, employed the latter to repair it, and when the repairs were nearly finished, a fire happened at an adjacent brewhouse, which extended to the dock and burnt the ship, it was held that the shipwright was entitled, notwithstanding the fire, to recover the value of the repairs actually done. (b)

The master and freighter of a vessel agreed, by simple contract, that the vessel should proceed to St. Petersburg, and there load from the freighter's factors a "complete" cargo of hemp, and eighty tons of iron, and proceed therewith to London, and deliver the same on being paid freight for hemp 5*l.* *per ton*, and for iron 5*s.* a ton; and the master, fearing an embargo after his arrival at St. Petersburg, hastily quitted with only half a cargo, and the freighter consequently refused to pay freight for that which he had actually brought: it was held, that the contract was divisible and apportionable, and that as the freight was to be paid for by the ton, the fair and reasonable construction was, that the plaintiff should receive freight according to the quantity per ton which he had delivered, and that the defendant should have a remedy by means of a counter action against the plaintiff for that which he had not performed, and which he ought to have done. "In this way," observes Grose, J., "perfect justice will be done to both, but not so if the delivery of a complete cargo were made a condition precedent. (c)

And if the portion of the contract remaining unperformed does not constitute part of the *essence* of the engagement, and go to the root of the consideration and cause of action, an action is maintainable upon the contract, the defendant being at liberty to resort to his cross action to recover

Hamilton, 5 M. & W. 645.

(a) *Roberts v. Havelock*, 3 B. & Ad. 404.

(b) *Menstone v. Athawes*, 3 Burr. 1592. *Ad-*

lard v. Booth, 7 C. & P. 108. Contra if the contract be entire, ante p. 196.

(c) *Ritchie v. Atkinson*, 10 East, 295, 310.

compensation for any damage he may have sustained by reason of the non-performance of the literal terms of the engagement. (d) If a particular time, for example, is mentioned for the completion of work contracted to be done and actually commenced, the performance of it by the exact hour or day specified is not a condition precedent to the right of action upon the contract, unless the intention of the parties that such should be the case is clearly and unequivocally expressed. (e) Thus, if a builder contracts to build a house for 500*l.* by a day certain, and completes it reasonably near the time specified, he is entitled to an action for the money, for the stipulation as to time is not, in such a case, "a condition going to the *essence* of the contract. The parties never could have contemplated, that if the house were not completed by the day named, the builder should have no remuneration; at all events, if an engagement so unreasonable was contemplated, the parties should have expressed themselves with a precision that could not be mistaken." (f) A condition that the work contracted for shall be done in "a proper and workman-like manner" is not a condition precedent going to the whole root of the action." "Such a condition is implied in every contract for work and labour, and if it were a condition precedent to the plaintiff's right to remuneration, any little deficiency would destroy the contract, and deprive the plaintiff of any claim for payment." Neither is "the performance of *every portion* of the work a condition precedent to the payment of the stipulated price, otherwise the least deviation would deprive the plaintiff of the whole price." (g)

If the contract, in fact, has been substantially performed, the action is maintainable. By an agreement between a landlord and tenant, it was stipulated that the tenant should, within one year from the making of the agreement, expend the sum of 200*l.* in erecting a kitchen and making various alterations and repairs upon the demised premises, to be inspected and approved of by the landlord, and done in a substantial manner, and the tenant was to be allowed to deduct 200*l.* out of the first year's rent. The alterations and repairs were done, and the tenant claimed the deduction, but the landlord, conceiving the value of them to be far below 200*l.*, refused to allow it, and maintained that his approval was a condition precedent to the tenant's right to retain the amount; but the court held that the *essential* part of the contract was the making of the alterations and repairs, and that the landlord's approval could not be considered a condition

(d) Little Dale, J., *Franklin v. Miller*, 4 Ad. & E. 605. *Chanter v. Dewhurst*, 13 Law J. N. S. (Exchq.) 198.

(e) "Of late the doctrine as to conditions precedent has been considerably relaxed. . . . In

all cases it is a mere question of intention." Vaughan, J., 5 Sc. 382.

(f) Tindal, C. J., *Lucas v. Godwin*, 4 Scott, 509; 3 Bing. N. S. 744.

(g) *Mondel v. Steel*, 8 M. & W. 870.

precedent, as, if it were, the tenant's right to the money might be altogether defeated, although the contract on his part had been faithfully fulfilled. (*h*)

The defendant promised to pay the plaintiff 5*l.* if he would get him a tenant for certain premises. The plaintiff procured one S., with whom the defendant entered into an agreement, and from whom he received a deposit. Subsequently, however, the defendant consented to release S. from the further performance of the agreement, but retained the deposit; and it was held that the condition as to the procuring of the tenant had been substantially performed on the part of the plaintiff, and that the latter was entitled to recover the 5*l.* (*i*)

Abatement of the claim, and of the correspondent liability, when the consideration for a simple contract has not been fully and literally performed. If a contract of sale, or for work and services on the one side, and payment on the other, has been so far executed as to give rise to a cause of action in respect of the thing sold or the work done, but has not been fully performed, it is competent to the defendant to show, in reduction of the price agreed to be paid, that the subject matter of the contract is diminished in value by reason of the incomplete and inefficient execution of the contract by the plaintiff. In an action for the price of a warm-air apparatus, it appeared that the plaintiff had agreed to erect a powerful warm-air stove and apparatus in a chapel, and that the defendant had agreed to pay him the sum of 70*l.* for so doing, and the claim for the money was resisted on the ground that the apparatus was imperfect, and did not answer the purpose for which it was known to be required; and it was held by Tindal, C. J., that if the stove in question was altogether incompetent and unfit for the purpose, and did not at all answer the end for which it was intended, the defendant was not bound to pay for it; but that if the apparatus was in the main substantial, but not quite so complete as it ought to have been, according to the contract, the action was maintainable for the price, and that the jury might deduct from the full price such a sum as would enable the defendant to do that which was required to make it complete and perfectly effective. (*k*) "Where a party engages to do certain work on certain specified terms, and in a certain specified manner, but does not perform the work so as to correspond with the specification, he is not, of course, entitled to recover the price agreed upon in the specification, nor can he recover according to the actual value of the work done, as if there had been no special contract. What the plaintiff is entitled to recover" (if he

(*h*) *Dalman v. King*, 5 Sc. 382.

(*i*) *Horford v. Wilson*, 1 Taunt. 12.

(*k*) *Culler v. Close*, 5 C. & P. 337. *Allen v.*

Cameron, 1 Cr. & M. 832. *Chapel v. Hicks*, 2 Cr. & M. 214; 4 Tyr. 430, s. c.

is entitled to recover anything) "is the price agreed upon in the specification, subject to a deduction, and the measure of that deduction is the sum which it would take to alter the work to make it correspond with the specification." (l) And the defendant is not, by reason of his having given evidence of such breach of contract on the part of the plaintiff, and obtained a reduction of the agreed price, according to the difference between the value of the work actually done and that which ought to have been done according to the contract, precluded from bringing his cross action to recover compensation for any special damage he may have sustained by reason of the non-compliance of the plaintiff with the strict terms of the engagement. (m)

Thus, in an action for the breach of a special contract to build a ship, with scantlings, fastenings, and planking, according to a certain specification, by reason whereof the ship so strained herself on a voyage that it became necessary to re-fasten and repair her, the defence pleaded was, that the defendant had previously sued the plaintiff for the agreed price of the ship, and given evidence of such breach of contract in reduction of the price, and that the same had been reduced accordingly; it was held, that the plea constituted no answer to the action, as all that the plaintiff could by law have been allowed on the former trial was the difference in value between the ship as she was at the time of the delivery and what she ought to have been according to the contract; that to that extent the plaintiff must be considered to have received satisfaction for the breach, but no further; and that all claim for damages beyond that amount arising from the subsequent necessity of more extensive repairs and alterations, which could not have been allowed in the former action, might then be recovered. (n)

In contracts for the sale of goods and chattels, as well as in contracts for work and labour, the agreed price may be reduced by showing that the goods were not of the proper quality or description, or that the consideration was not fairly and fully performed, but care must be taken to make the distinction between an action on the special contract itself for the agreed price, and an action upon a bill of exchange or promissory note given by way of payment of the amount. "The cases have completely established the distinction between an action for the price of the goods and an action on the security given for them. In the former, the value only can be recovered; in the latter, the party holding bills given for the price of

(l) Parke, J., *Thornton v. Place*, 1 Mood. & Rob. 218. *Ellis v. Hamlen*, 3 Taunt. 53. *Baillie v. Kell*, 4 Bing. N. S. 652. *Street v. Blay*, 4 Bing.

N. S. 638.

(m) *Mondel v. Steel*, 8 M. & W. 858.

(n) *Ib.* 872.

the goods supplied can recover on them unless there has been a *total failure* of the consideration. If the consideration fails partially, as by the inferiority of the article furnished, the buyer must seek his remedy by a cross action. (*o*) The contract also may be divisible, but the security is entire."

An agreement was entered into between the plaintiff and the defendant for the sale of the lease of a house. The defendant accepted a bill of exchange for the purchase-money, and was let into possession of the premises, but the plaintiff afterwards, before the bill of exchange became due, refused to grant the lease pursuant to the agreement; and it was held that this was no answer to the action on the bill; that as the defendant had been let into possession of the house, and there had not been a total failure of the consideration, he must pay the amount of the bill, and bring his cross action upon the agreement to recover damages for the non-execution of the lease. (*p*)

So, where a contract was entered into for the purchase of goods of "good quality and moderate price," and the price was estimated at 1000*l.*, and bills were given for that amount, it was held to be no defence to an action on the bills that the goods turned out to be worth much less than the estimated price, and that the acceptor had paid on the bills more than the real value of the goods. (*q*)

SECTION III.

OF MUTUAL CONDITIONS, AND DEPENDENT AND INDEPENDENT COVENANTS AND PROMISES.

It has been said that executory covenants, *inter partes*, may be divided into three classes. *First*, such as are conditional and dependent, in which the performance of the one depends upon the prior performance of the other. *Secondly*, such as are independent, where either party may recover damages from the other for the injury he may have received by a breach of the covenant in his favour, and where it is no excuse for the defendant to allege a breach of the covenant on the part of the plaintiff; and, *thirdly*,

(*o*) *Morgan v. Richardson*, 1 Camp. 40 n.
Pye v. Gwinn, 2 Camp. 348.
 (*p*) *Moggridge v. Jones*, 3 Camp. 38; 14 East,

486 s. c.
 (*q*) *Obbard v. Betham*, M. & M. 483.

such as are mutual conditions, to be performed at the same time; where, if one party was ready, and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is "obliged to do the first act." (a) "This last rule applies to every case of a sale of property where the one party engages to convey on a day certain, and the other to pay at the same time, and this whether the one is stated in terms to be the consideration for the other or not. In neither case will the court compel one party to perform his part until the other has done or has offered to do his own." (b) If A. covenant to convey an estate to B., and in consideration thereof B. covenants to pay A. a sum of money, these covenants constitute mutual conditions, and neither of the parties can maintain an action without showing performance of, or an offer to perform, his part. It is a sufficient performance, however, of the vendor's part of the contract if he is "ready and willing" to execute a conveyance; inasmuch as in the absence of an express stipulation to the contrary, it is the duty of the purchaser to prepare the conveyance, and tender it to the vendor for execution. (c)

Independent covenants and promises.—But "if there be a day set for the payment of the money or for the doing the thing which one promises and agrees to do for another thing, and that day is to happen, or may happen before the other thing can be performed, an action may be brought for the money before the thing be done, for it appears that the party relied upon his remedy upon the contract," and not upon a previous or concurrent performance. (d)

By articles of agreement under seal, the plaintiff agreed to sell and the defendant to purchase of the plaintiff certain land and premises, and the defendant covenanted to pay on or before a fixed day, as the consideration for such sale and purchase, a certain sum to the plaintiff, and it was held, that as the time was fixed for the payment of the purchase money, the covenant was independent, and that an action was maintainable upon it for the money before any conveyance of the property had been tendered or accepted, each party having relied upon his remedy by way of action upon the covenants, and not made the performance of them a condition precedent. (e)

(a) *Jones v. Barkley*, Doug. 684. *Kingston v. Preston*, cited *ib.* p. 691.

(b) *Le Blanc, J.*, 8 T. R. 374. *Buller, J.*, 4 *ib.* 765. *Heard v. Wadham*, 1 East, 619. *Lord Denman*, 2 B. & Ad. 157. *Kemble v. Mills*, 2 Sc. N. R. 121.

(c) *Poole v. Hill*, 6 M. & W. 835. *Laird v. Pim*, 7 M. & W. 474, 485. *Stephens v. De*

Medina, 4 Ad. & E. N. S. 422. *De Medina v. Norman*, 9 M. & W. 820.

(d) *Holt, C. J.*, 12 Mod. 461; 1 Salk. 118, 171. *Parker v. Rawlings*, 12 Moore, 529; 4 Bing. 280, s. c. *Spiller v. Westlake*, 2 B. & Ad. 157.

(e) *Pordage v. Cole*, 1 Saund. 319, h. *Mattock v. Kinglake*, 10 Ad. & E. 50. See also

An indenture was made between Sir Ralph Poole, knight, of the one part, and Sir Richard Polchester, of the other part, whereby Sir Ralph did covenant with Sir Richard to serve him with three esquires in the wars of France, and Sir Richard covenanted with Sir Ralph to pay so much money for the service, and it was further agreed that half the money should be paid in England on a certain day before they went to France, and the rest by quarterly payments; and it was held, that the action might be brought for the money before the service, and that each had equal remedy, the one for the money, the other for the service. (f)

An action of covenant was brought upon an agreement under seal, whereby the plaintiff agreed to take the defendant into partnership, and also to assign over to him a moiety of the interest in the house, to commence "*from and after*" a day named, on the terms and conditions that the defendant should pay to the plaintiff "*on or before*" the day specified, the sum of 300*l.*, as a premium or fee to be admitted into the said partnership; and the breach alleged was, that the defendant had not paid the said sum, although the plaintiff was willing to take him into the said partnership. The defendant pleaded that no articles of co-partnership had been made and no assignment to him of half the interest in the house; but it was held, that the covenant of the defendant to pay the money was precedent to the plaintiff's covenant, and was broken before that was to be executed, and that the plaintiff consequently was entitled to recover the amount. (g)

The covenants of the one party are sometimes mutual and dependent, whilst those of the other are independent. "The one may wish to reserve an option to himself, and may therefore qualify his covenant; but he may not choose to give any option to the other party, and may insist upon having from him an unconditional and unqualified covenant." (h) We have already seen that if a deed purports and professes to grant and convey an interest, the covenants of the grantee immediately relating to that interest, and founded on the grant thereof, are conditional and qualified, so that the liability of the grantee upon them, is dependent upon the interest or some portion thereof being actually transmitted to him. But this is not the case with respect to the covenants of the grantor of that interest; his covenants are independent and unconditional, and he is consequently liable upon them, whether the interest he professes to convey

French v. Campbell, 2 H. Bl. 178. *Wilks v. Smith*, 10 M. & W. 360.

(f) *Pool v. Tolcester*, cited *Williams Saunders*, vol. 1, 320, b.; & 7 Co. 10 b.

(g) *Walker v. Harris*, Anstr. 245. See also *Terry v. Dumiza*, 2 H. Bl. 389.

(h) *Ellenborough*, C. J., 3 M. & S. 321.

does or does not pass. If, for example, a lessor professes to grant a lease, and covenants with the lessee "that he, the lessor, is owner at the time of the lease, or that the lessee shall quietly enjoy, or shall be discharged and saved harmless from certain incumbrances, the lease may be void, but the lessor is liable upon his covenants. (i) So, if a man by deed purports to grant lands to another in fee, and no fee in the lands passes, the grantor is nevertheless chargeable upon his covenants. (k) In an action of covenant upon a deed of bargain and sale of lands, it appeared that the deed had not been inrolled pursuant to the statute, and was consequently void, and it was contended that the covenants of the bargainor or vendor, were void also, but the court held, that their validity did in no respect depend upon the passing of the estate by the deed; the deed might be of no effect as a bargain and sale, but the covenants of the vendor were good and could be enforced. (l) A rector, by indenture, granted a rent charge out of his benefice, and covenanted to pay the same to the grantee. The grant was void by the statute 13 Eliz. c. 20, which declares that "all charging of benefices with any pension out of the same shall be *utterly void*." Yet the rector was holden liable upon his covenant. (m) A bill of sale of a ship transferring the property in the ship by way of mortgage was held to be void for want of reciting the certificate of registry therein, as required by stat. 26 Geo. 3, c. 60, s. 17. Yet the mortgagor was held liable upon his covenant contained in the same instrument for the repayment of the money lent. (n) Thus, while the covenants of the one party are conditional and dependent, the covenants of the other party may be unconditional and independent, as is further exemplified in the case of contracts of an executory nature, where the liability of the one party is dependent upon the performance of some prior act by the other, whilst the covenant of that other is absolute and unqualified for the performance of such prior act.

It is a principle of the civil law, that if the fulfilment of the condition be hindered by the party whose interest it is that it be not fulfilled, whether it depend on his own act or not, the condition with respect to him shall be deemed to be accomplished. And he shall be obliged to do what he has bound himself to do, to give, or or suffer, &c. (o) And by the

(i) *Waller v. Dean and Chapter of Norwich*, 1 Brownl. 21; Owen, 136.

(k) *Jones v. King*, 4 M. & S. 188.

(l) *Northcote v. Underhill*, 1 Raym. 388; 1 Salk. 199, s. c.

(m) *Mowys v. Leake*, 8 T.R. 411.

(n) *Kerrison v. Cole*, 8 East, 231. See also *Gaskell v. King*, 11 East, 164. *Wigg v. Shuttleworth*, 13 East, 87, 89. *Hove v. Synge*, 15 East, 439.

(o) Jure civili receptum est, quoties per eum cujus interest conditionem non impleri, fiat quominus impleatur, perinde haberi ac si impleta conditio fuisset. Quod ad libertatem, et legata, et ad hæredum institutiones perducitur quibus exemplis stipulationes quoque committuntur, cum per promissorem factum esset, quominus stipulator conditioni pareret, l. 161, ff. de reg. jur. Domat, l. 1, tit. 1, s. 4, xviii.

law of England, where the one party "by doing a previous act would acquire a right to any debt or duty, and the other prevents him from doing it, he acquires the right as completely as if it had been actually done." (p) If one man is to pay money to the other, upon an act being done, and the other is ready and offers to do the act, and the party hinders him, this is tantamount to performance, and the party acquires a complete right to the money, because it is a principle, that he who prevents a thing from being done, shall not avail himself of the non-performance which he has occasioned. (q)

An agreement was entered into between the plaintiff and the defendant, that the plaintiff should pull down and prostrate the walls of three houses, and erect for the defendant on the site thereof, a malt-house and other buildings, and receive a certain sum of money for his pains, and the plaintiff showed that he was ready, and offered to do the work, but that the defendant prevented him; and it was held, that the defendant was bound to pay the money, and that he ought not to take advantage of his own wrong. (r)

And if the act cannot be completed without the concurrence of the party for whom it is to be done, if the party who is to do the act offers, and does as much as he can without such concurrence, he does what is equivalent in law to actual performance of the act, and may insist upon any recompense he was to have upon such performance. But the law requires him to do his utmost endeavours to entitle himself to the action. "A tender or offer to do a thing cannot amount to a performance in law, unless the tender or offer is actually rejected, or unless it is to be made at a particular time or place, and the party to whom it is to be made does not attend. And a man who would insist on a tender or offer at a particular place, and a non-attendance by the party to whom it was to have been made, must show that he was ready at the place up to the last moment that the tender could properly have been made." (s)

(p) 8 East, 443, *Jones v. Barkley*, 2 Doug. 694.

(q) Holt, C. J., *Lancashire v. Killingworth*, 1 Raym. 686; 1 Com. 116; Co. Litt. 206, b. *Heard v. Wadham*, 1 East, 619, 630; 3 Sc. N. R. 215.

(r) *Peters v. Opie*, 1 Vent. 177; 2 Saund. 350. *Collins v. Price*, 5 Bing. 132. *Ferry v. Williams*, 8 Taunt. 70; 1 Moore, 498, s. c.

(s) *Lancashire v. Killingworth*, 1 Raym. 686; 3 Salk. 623, s. c.

CHAPTER VII.

OF COVENANTS AND SIMPLE CONTRACTS AND PROMISES CREATED BY IMPLICATION OF LAW.

SECTION I.—*Implied covenants* as between grantor and grantee, and lessor and lessee of an estate, right, or interest—Of the duration of the implied covenant for quiet enjoyment when the lessor is tenant for life only—Of implied covenants as between assignor and assignee.

SECTION II.—*Implied promises* as between lessor and lessee, and assignor and assignee—Borrower and lender—Insurer and insured—Principal and surety—And between sureties by way of contribution to their common liability—Of promises implied from persons who undertake a gratuitous trust, or to discharge an office of skill—Also from a husband in respect of necessities furnished, and protection afforded, to his wife when living, and in respect of her burial when dead—Implied promises in respect of benefits derived from a part execution of a special contract.

SECTION III.—*Of implied promises* resulting from work and service—Also from work done and materials supplied under a special contract which has been abandoned or rescinded, or which proves to be invalid or nugatory—Building contracts—When the employer loses the benefit of his special contract, and becomes liable upon an implied promise to pay by measure and value.

SECTION IV.—*Of implied contracts of sale and implied warranties and promises* in respect of goods sold—Implied promise by the vendor to disclose latent defects known to him; to resort to no artifice, or concealment, or wilful misrepresentation; to furnish an absent purchaser with an article fairly corresponding with the description given in the order—Implied warranties on sales by a vendor who is told that the subject matter of the sale is required for a specific purpose, or who manufactures and sells an article to be used in a particular manner—Implied warranties on sales of provisions.

SECTION V.—*Of implied promises* in respect of money lent; money paid; money had and received; and an account stated—And of the implied promise to refund money received through mistake, or through the medium of oppression, extortion, or deceit, or by virtue of an illegal contract.

SECTION I.

OF IMPLIED COVENANTS.

Although the words of a contract under seal do not in themselves import any express covenant, yet the law, in order to give a proper force and

effect to the contract to promote good faith and make men act up to the spirit as well as to the letter of their engagements, will create and supply, as a necessary result and consequence of the contract, certain covenants and obligations which bind the parties as forcibly and effectually as if they had been expressed in the strongest and most explicit terms in the deed itself. By the common law, whenever any estate or interest was granted by deed, there resulted an implied covenant on the part of the grantor, that he would do nothing to defeat or destroy the estate or interest he professed to grant. If one man granted to another an incorporeal right, the law implied a covenant from the grantor that he would do nothing to annul or avoid such grant; if he granted a watercourse, a right of way, or estovers, there resulted from such grant, by inference of law, a covenant for the quiet enjoyment of the thing granted, and if the grantor stopped up the watercourse, or the road, or cut down the wood out of which the estovers were to be taken, the grantee was entitled to an action of covenant against him for the misfeasance. (a)

Now, however, it is enacted by the act of 7 & 8 *Vict. c. 76, s. 6*, which extends to all estates, rights, and interests created on and after the 1st of January, 1845, that the word "grant" in a deed, shall not have the effect of creating any COVENANT *by implication*, except in cases where by any act of parliament, it is, or shall be declared, that the word "GRANT" shall have such effect.

Implied covenants as between landlord and tenant.—On the execution of a lease under seal the law implies from the word "demise" or any equivalent words in the contract constituting and creating a lease, a covenant on the part of the lessor that he has a right to make the lease and to grant the estate or interest in the land which he professes to create, and that the lessee shall quietly possess and enjoy that estate without any interruption from the lessor or those claiming under him, or from any person claiming by title paramount, and also from the words "yielding" or "paying," or any equivalent words amounting to a reservation of rent, a COVENANT, on the part of the lessee, to pay the rent so reserved, although the words do not in themselves import any express covenant. (b) And if a man by deed takes upon himself to demise that which he has no right to demise, an action may be maintained against

(a) 1 Saund. 321; Bac. Abr. Covenant, B.

(b) Shep. Touch. 165, 167; 1 Sid. 447; Co. Litt. 365, a. *Node's case*; 4 Co. Rep. 80, b; 2 Lev. 206; T. Jones, 102; Cro. Jac. 78; 1 Salk. 38; 1 Show. 78, s. c.; Carth. 135; 1

B. & C. 410; 2 D. & B. 670, s. c.; 9 Ves. 330; 15 Ves. 264; 12 M. & W. 85; Buller, J., 2 B. & P. 26; Domat. 1, tit. 2, s. 10; Tindal, C. J., 4 M. & P. 510.

him by his lessee for the breach of this implied covenant, whether the latter has or has not entered upon the land, and been actually evicted therefrom. Thus, where the lessee alleged as a breach of such implied covenant, that at the time of the demise the lessor was not seized of the land but a stranger, but did not show any entry on the lands by virtue of the lease, nor any ejectment by the stranger; it was held, that the action would lie notwithstanding, "for the breach of the covenant was, that the lessor had taken upon himself to demise that which he could not, and it is not reasonable to force the lessee to enter upon the land, and so commit a trespass." (c)

When a lease has been granted by a tenant for life, the duration of the implied covenant for quiet enjoyment is restricted to the lifetime of such tenant for life; if, therefore, the lessee is evicted by the remainder-man after the death of the tenant for life, but before the expiration of the term, the lessee cannot maintain an action of covenant against the executors of the tenant for life in respect of such eviction. (d) In all assignments of leases and existing interests, there is an implied covenant on the part of the assignor, that he has resorted to no fraudulent concealment or wilful misrepresentation to mislead the assignee, and that he has himself done nothing, and will do nothing, to prejudice or defeat the estate, title, or interest that he professes to assign.

The proprietor of a medicine, and a recipe for making the same, "bargained, sold, assigned, transferred, and set over," the medicine and recipe, and all his "right, title, interest, claim, or demand to the said medicine, &c.," to a purchaser; and it was held that the law would imply from the transfer and assignment a covenant from the vendor, that he would not himself prepare and vend the medicine so assigned, or engage with others in so doing. (e) So, where a man by deed "bargained, sold, assigned, and transferred," a sum of money due to him from a third person, it was held that the law would imply, from the words of transfer and assignment, a covenant from the assignor to do no act to prevent the assignee from obtaining possession of the sum so assigned. (f)

(c) *Holder v. Taylor*, Hob. 12. *Hacket v. Glover*, 10 Mod. 142.

(d) *Adams v. Gibney*, 4 M. & P. 510; 6 Bing 656, s. c.

(e) *Seddon v. Senate*, 13 East, 68.

(f) *Dering v. Farington*, 3 Keb. 304; Freem. 368; 1 Mod. 113.

SECTION II.

PROMISES BY IMPLICATION OF LAW.

Implied promises as between lessor and lessee, and assignor and assignee.—When the estate, title, or interest is created or assigned by writing not under seal, the law raises certain implied promises and undertakings from the one party to the other, corresponding with the implied covenants that arise when the estate, right, or interest is created or assigned by deed. (a) If a man makes a lease by parol, there is an implied promise from the lessor to put the lessee into possession of the thing demised; and an action will lie against the former for not doing so within a reasonable period. (b) If apartments in the interior of a house are demised by parol, the law implies a promise from the lessor to allow the tenant the use of the door-bell and knocker, the benefit of the skylight on the staircase, and the use of the water-closet; and the enjoyment of all such rights as are naturally incident to the subject matter of the contract, and necessary for the reasonable and comfortable enjoyment of it. (c) In the case of an executory agreement for the sale and purchase of a lease, the law implies a promise from the vendor to establish and make good his title to the lease, which he proposes to sell and assign. (d) And when the purchaser has accepted the assignment, the law implies a promise from him to the assignor to pay the rent reserved in such lease, and perform the covenants therein contained. (e)

Of implied promises generally.—The intention of the parties to any particular transaction may be gathered from their acts and deeds, in connexion with surrounding circumstances, as well as from their words; and the law therefore implies, from the silent language of men's conduct and actions, contracts and promises as forcible and binding as those that are made by express words, or through the medium of written memorials not

(a) *Coe v. Clay*, 3 M. & P. 57. *Hart v. Windsor*, 12 M. & W. 85.

(b) *Coe v. Clay*, 3 M. & P. 57; 5 Bing. 440, s. c. *Hawkes v. Orton*, 5 Ad. & E. 367; 6 N. & M. 842, s. c.

(c) *Underwood v. Burrows*, 7 C. & P. 29.

(d) *Souter v. Drakes*, 5 B. & Ad. 992; 3 N. & M. 40, s. c. *Doe d. Gray v. Stanion*, 1 M. & W. 701. *Hall v. Betty*, 5 Sc. N. R. 508.

(e) *Burnett v. Lynch*, 8 D. & R. 376, 383; 5 B. & C. 602, s. c.

under seal. (*f*) If a man borrows a horse, the law implies a promise from the borrower to the lender to feed the animal properly and sufficiently whilst it remains in his charge and possession. (*g*) And in the case of loans of goods and chattels generally, the law implies a promise from the borrower to take proper and reasonable care of the thing borrowed; to use it according to the directions given or understood; to restore it at the proper time, and to restore it in a proper condition. (*h*) If a ship is insured, the law implies a promise or undertaking from the insurer that the vessel is seaworthy at the time that the insurance is effected; and if the life of one man is assured by another, there is an implied understanding on the part of the assurer to make a full disclosure of all material circumstances within his knowledge affecting the health of the assured.

If a man consents to become surety for a debtor at his request, the law implies a promise from the latter to indemnify the surety from all expenses fairly arising from his situation of surety; (*i*) and if several persons together become surety for one principal in respect of the same debt or transaction, either jointly or severally, or by the same or different contracts, there is an implied contract or understanding amongst them all that they will bear their several proportions of the common liability; and if one of them is compelled to pay the whole debt, or more than his own proportion of it, he may sue his co-sureties upon an implied promise of contribution, and recover from each individually an aliquot share or proportion of the common burthen. (*k*) But this implied promise may be rebutted by circumstances tending to show a different understanding and contract between the parties. (*l*) If one of several joint contractors, also, not being partners, is compelled to pay a demand, for the satisfaction of which they are all jointly liable, the law raises an implied promise from the others to pay their several shares and proportions of the common liability. (*m*)

Promises implied from persons who undertake a gratuitous trust, or to discharge an office of skill.—The law implies also from all persons who undertake any duty, charge, office, employment, or trust, a promise to act with integrity and diligence, and proper and reasonable care, in the execu-

(*f*) Implied contracts were termed by the civilians obligations *quasi ex contractu*, and were said to be derived *ex consensu facto vel presumpto*.

(*g*) *Handford v. Palmer*, 5 Moore, 74; 2 B. & B. 359, s. c.

(*h*) Story on Bailments, c. 4.

(*i*) *Toussaint v. Martinnant*, 2 T. R. 105.

Crafts v. Tritton, 2 Moore, 416, post.

(*k*) *Cowell v. Edwards*, 2 B. & P. 268. *Deer-*

ing v. Winchelsea, id. 270. *Mayhew v. Cricket*, 1 Wils. *Dunn v. Slee*, 1 Moore, 2. *Davies v. Humphreys*, 6 M. & W. 168. The insolvency of any one of the sureties does not cast any additional obligation on the others. *Browne v. Lee*, 9 D. & R. 709; 6 B. & C. 697.

(*l*) *Turner v. Davies*, 2 Esp. 478.

(*m*) *Holmes v. Williamson*, 6 M. & S. 159; *Edge v. Knapp*, 6 Sc. N. R. 707, 713, post.

tion of such duty, trust, or employment, and according to orders given and assented to. (*n*) A banker, who has in his hands sufficient funds of a customer, impliedly undertakes to pay a check drawn by the latter, if the check be presented within banking hours; (*o*) and a man who undertakes the duty and office of an executor, and has assets sufficient for the purpose, impliedly promises to pay for a funeral suitable to the station in life of his testator, furnished and provided by a third person in the absence of the executor, and without his knowledge and concurrence; and the law implies a request from the executors to the stranger who has undertaken the necessary duty, to do what he has done, although in point of fact they gave no orders, and made no promise. (*p*) If a man voluntarily takes charge of the goods and chattels of another, the law implies a promise from him to take reasonable and proper care of them. (*q*) The law also implies a promise from a common innkeeper to secure his guest's goods in his inn, (*r*) and to take all reasonable and proper care of horses and cattle placed in his stables; (*s*) from a common carrier, to be answerable for the goods he carries; (*t*) from a ferryman, safely to transport things entrusted to him across a river, and deliver them on the opposite bank; from a common farrier, that he will shoe a horse without laming him, in which, if they fail, an action lies to recover damages for the breach of their implied undertaking; (*u*) also from a trainer of horses, that he will exercise reasonable skill and management in the riding of horses entrusted to him; (*x*) from every artificer and handicraftsman, that he will exercise his art rightfully, truly, and skilfully, as he ought; (*y*) and from brokers, agents, attorneys, surgeons, and other professional men, that they will severally, in their respective callings, exercise competent skill and proper care in the service they undertake to perform, in which, if they fail, an

(*n*) Black. Com. 3, p. 163. *Govett v. Radcliffe*, 3 East, 66. *Streeter v. Horlock*, 7 Moore, 287. *Gurford v. Bayley*, 4 Sc. N. R. 398.

(*o*) *Marsetti v. Williams*, 1 B. & Ad. 415. *Whitaker v. Bank of England*, 1 C. M. & R. 751. *Boyd v. Emerson*, 2 Ad. & E. 184.

(*p*) *Rogers v. Price*, 3 Y. & J. 28. *Tugwell v. Heyman*, 3 Campb. 297.

(*q*) *Southcote's case*, 4 Rep. 83, b. 84. *Coggs v. Barnard*, Raym. 909; 2. Smith's leading cases, 82, 104; Story on Bailments, ch. 2.

(*r*) "Secundum legem et consuetudinem regni nostri Angliæ, hospitatores qui hospitia communia tenent ad hospitandum homines per partes ubi hujusmodi hospitia existunt transeuntes et in eisdem hospitantes, eorum bona et catalla infra hospitia illa existentia absque distractione aut amissione custodire die ac nocte teneantur, ita quod pro defectu dictorum hospitatorum vel servientium suorum damna non eveniant ullo modo."

Fitz. nat. brev. 91. a. b. 94. Reg. p. 105. Calve's case, 8 Rep. 32, a. *Stannian v. Davis*, 1 Salk. 404; 6 Mod. 223, a. c. *Sanders v. Spencer*, Dyer, 266, a. Story on Bailments, § 470, 472. *Richmond v. Smith*, 8 B. & C. 9. But the innkeeper is exonerated where the guest takes a room for purposes of trade, and chooses to have his goods under his own care. *Buttress v. Clements*, 4 M. & S. 306.

(*s*) *Dawson v. Cholmeley*, 13 Law Jour. Rep. N. S. Q. B. 33.

(*t*) *Muschamp v. Lancaster and Preston Railway Company*, 8 M. & W. 421. *Wyld v. Pickford*, 8 ib. 460, 461. *Cairns v. Robins*, 8 ib. 258. *Coggs v. Bernard*, Raym. 918.

(*u*) *Walker v. Jackson*, 10 M. & W. 161.

(*x*) *Wilson v. Brett*, 11 M. & W. 113.

(*y*) *Norris v. Staps*, Hob. 211; 1 Rol. Abr. 91, pl. 15. *Best v. Yates*, 1 Vent. 268. *Slater v. Baker*, 2 Wils. 359.

action lies to recover damages for the breach of their implied promise. (z) The law also implies from an innkeeper or victualler, who opens a house for travellers, an undertaking or promise to entertain, at a reasonable charge, all persons who apply for food and lodging; (a) from a smith, who opens a shop by the road side, a promise to shoe the horses of all wayfarers, on being tendered a reasonable satisfaction for the same; (b) from a common carrier, a promise to receive and carry all goods for transportation, on receiving a suitable hire; (c) and from a ferryman, a promise in like manner to convey all comers over a common ferry. (d)

The husband and wife being one person in the eye of the law, the husband is liable, under ordinary circumstances, upon an implied promise to pay for goods, food, and clothing, supplied to the wife the same as if they had been supplied to himself personally, unless the wife is living separate from him in open adultery, or he has provided her with a separate maintenance, and given express notice that he will not be responsible for the debts she may contract. If the husband, consequently, wrongfully discards the wife, any person may furnish her with raiment, food, and lodging, and with all the necessaries of life, suitable to her rank and station in society, and the law will imply a promise from the husband to pay for the things so supplied to the wife, in the same way as if they had been supplied to himself at his express request. (e) And although a husband may be living separate from his wife, and may be allowing her a separate and suitable maintenance, yet if he is guilty of violence towards her, so that she is obliged to resort to the law for protection, and exhibit articles of the peace against him, and to employ an attorney to conduct the proceedings, the law raises an implied promise from the husband to pay the costs incurred, and to pay the attorney for his services and the business he has done, just as if such services had been rendered to the husband himself. (f)

As a man is bound to support his wife whilst living, as being part and parcel of himself, so is he bound by law to bury her when dead; and if the husband has abandoned the wife, and lives in a distant land, and is unable; or being able, is unwilling, and neglects to bury her, any stranger may undertake the duty, and defray the expenses of a funeral suitable to

(z) *Boorman v. Brown*, 3 Ad. & E. N. S. 511.

(a) A traveller, however, is not entitled to select a particular apartment, or to insist on occupying a bedroom for the purpose of sitting up all night. *Fell v. Knight*, 8 M. & W. 269.

(b) *Jefferies, C. J., Jackson v. Rogers*, 2 Show. 327; 1 Salk. 18; Baym. 654.

(c) *Pickford v. Grand Junction Railway Company*, 8 M. & W. 372. Story on Bailments, c. 8, s. 508.

(d) *Hardr.* 163.

(e) *Robison v. Gosnold*, 6 Mod. 171. *Harris v. Morris*, 4 Esp. 42. *Thompson v. Hervey*, 4 Burr. 2178.

(f) *Turner v. Rootes*, 10 Ad. & E. 47.

her rank or fortune; and the law implies a request on the part of the husband to the stranger, so to do, as well as a promise to repay the money so laid out, upon which implied promise an action is maintainable against the husband, though the burial was, in point of fact, undertaken, and the money paid, without his knowledge or consent. (g)

In drawing the pleadings, and framing the declaration of the cause of action against a husband, or an executor, in respect of the funeral expenses of the wife or the testator, it must be stated, in order to show a good legal ground of action *ex contractu* upon the record, that the things furnished were supplied at the *request* of the husband, or the executors, and a *promise* to pay for them must be alleged. But no express request or promise to the effect set forth need be established in evidence. Proof of the actual facts and circumstances is sufficient to sustain the allegation, as from those facts, and the relative situations and circumstances of the parties, the law will imply both the *request* and the *promise*, so that in these as in other instances of implied contracts and promises, the ancient legal maxim is well supported, "in fictione juris subaistit æquitas."

Of the promise implied by law, in respect of benefits derived from a part execution of a special contract.—When parties have come to an express contract, and have specifically declared what their agreement is, the law will not imply one, for contracts and promises in law exist only where there is no express engagement between the parties; (h) but if the special contract has been partially executed, and afterwards abandoned, or rescinded by the mutual consent of the parties, or by one of them, pursuant to a power reserved to him for that purpose; or if the plaintiff has been discharged from his obligation to complete the contract, and the defendant has had the benefit of a partial execution thereof, the law implies a promise from him to pay the reasonable value of what he has had. A workman was induced to enter into a special contract to remove a quantity of rubbish for a certain sum, by reason of a false and fraudulent representation as to the depth of the rubbish, made by the employer; and it was held that the workman might repudiate the special contract as soon as he discovered the fraud, and sue his employer for compensation for his lost time and labour. (i)

(g) *Jenkins v. Tucker*, 1 H. Bl. 94. *Chapple v. Cooper*, 13 Law J., N. S. Excheq. 286.
(h) *Baile*, J., 2 T. R. 105; Lord Kenyon, 6 T. R. 324. *Weaver v. Borroughs*, 1 Str. 648. *Payne v. Whale*, 7 East, 274. *Davis v. Nicholls*,

2 Chitt. R. 320.

(i) *Selway v. Fogg*, 5 M. & W. 86. *Towers v. Barrett*, 1 T. R. 183. *Ferguson v. Carrington*, 9 B. & C. 59.

A man was let into the possession of land under a contract that he had made for the purchase thereof, the contract went off; but he continued to occupy; and it was held in an action by the intended vendor that he was liable, upon an implied promise, to pay a reasonable compensation to the latter, in respect of the use and occupation of the property. (*k*)

SECTION III.

OF IMPLIED PROMISES RESULTING FROM WORK AND SERVICE.

Generally speaking, every man who devotes his labour, his talents, and his time to the service of another, is entitled to a recompense, and the law implies a promise from the employer in case nothing has been said or stipulated concerning payment, to pay a reasonable compensation for the services rendered, and the right of action upon such implied promise or undertaking arises as soon as the work has been completed, and he is enabled to avail himself of the benefit of it; (*a*) but the law raises no implied promise in respect of mere gratuitous services, such as voluntary assistance in saving property from fire, or securing property found afloat, or beasts found astray, or voluntary and unsolicited supplies of food and lodging, or voluntary services rendered in and about the management of the affairs of another, for that which appears to have been offered and accepted as a gratuity, cannot afterwards be converted into a debt. (*b*) The law raises no implied promise of remuneration or payment in favour of a person who professes to render services of a purely honorary character. The barrister and physician consequently cannot maintain an action for their fees in the absence of an express and distinct contract for remuneration and promise of payment. (*c*)

(*k*) *Howard v. Shaw*, 8 M. & W. 118. *Waring v. King*, ib. 571.

(*a*) *Hughes v. Lenny*, 5 M. & W. 183. *Poucher v. Norman*, 5 D. & R. 649; 3 B. & C. 746, s. c.

(*b*) *Binstead v. Buck*, 2 W. Bl. 117. *Nicholson v. Chapman*, 2 H. Bl. 254; 2 Str. 278; 1

Esp. 86; Peake's Ad. c. 226; 1 C. & P. 434. *Taylor v. Brewer*, 1 M. & S. 290.

(*c*) *Chorley v. Bolcot*, 4 T. R. 317. The barrister and physician may recover upon an express contract to pay for services to be rendered. *Veitch v. Russell*, 3 Ad. & E. N. R. 928.

The plaintiff, a surgeon, for several years bestowed medical attendance upon a lady under the expectation that she would compensate him by a legacy at her death. The lady, however, died, and left him nothing, whereupon he brought an action against her executors; and it was held that he was entitled to a reasonable remuneration. "If the evidence," observes Tindal, C. J., "had shown that the work and labour in this case had been done upon an understanding that the plaintiff was to make no charge, but should receive a legacy on the death of Mrs. B., that would have amounted to an agreement that the remuneration for the plaintiff's services should depend solely upon her will." Here, however, no such understanding was proved. The plaintiff probably hoped and expected to receive a legacy; but this hope failing, I see no reason why he should not be remitted to his legal right. (*d*)

Services were rendered by the plaintiff to the defendant upon the terms mentioned in the following letter:—"I hereby agree to enter into your service as a weekly manager, and *the amount* of payment I am to receive I leave entirely to you;" and it was held that there was an implied promise from the defendant to pay *something* to the plaintiff for his services, and that the jury must ascertain how much the defendant, acting *bonâ fide*, ought honestly to have awarded. (*e*)

The work or service rendered may, of course, be performed by the servant or assistant of the plaintiff, as well as by the plaintiff himself; and it has been held, that if a man wrongfully decoys away my servant or apprentice against my will, and acquires and makes use of his labour and services, the law will imply a promise from the wrong doer to render to me a fair equivalent in respect thereof. (*f*)

Whenever a special contract for work and services has been abandoned and put an end to, and is no longer open and in existence, and the employer has derived some benefit and advantage from work done under it, he is liable, upon an implied promise, to make a reasonable remuneration and payment in respect thereof. (*g*)

Building contracts.—If a builder fails to comply with a specification for the building of a house under a special contract, and is consequently unable to maintain an action thereon for the contract price, he is entitled, nevertheless, if the employer keeps possession of the materials furnished, and accepts and retains the benefit of what has been done under the

(*d*) *Baxter v. Gray*, 4 Sc. N. R. 374.

(*e*) *Bryant v. Flight*, 5 M. & W. 114. *Owen v. Bowen*, 4 C. & P. 93.

(*f*) *Mansfield, C. J., Lightly v. Clouston*, 1 Taunt. 112. *Foster v. Stewart*, 3 M. & S.

195.

(*g*) *Burn v. Miller*, 4 Taunt. 475. *Phillips v. Jones*, 1 Ad. & E. 333. *Chanter v. Dewhurst*, 13 Law J., N. S. Exch. 198. *Hopkins v. Richardson*, 14 ib. 80, 81.

contract, to maintain an action upon a promise, which the law under such circumstances implies from the employer, to pay what the work may reasonably be considered to be worth. (h) In the case of building contracts, it often becomes important to determine whether, by reason of subsequent alterations by consent, in the mode and manner of doing the work, the original contract has been abandoned so as to give the plaintiff a right to treat it as a nullity, and to sue on an implied contract to pay the value of the work, according to what is technically termed a *quantum meruit*.

If work has been agreed to be done, and materials supplied, under a special contract for certain estimated prices, and there has subsequently been a deviation from the original plan by the consent of the parties, the contract and estimate are not on that account excluded, but are to be the rule of payment, as far as the contract can be traced to have been followed, and the excess only is to be paid for according to the usual rates of charging; but if the original plan has been so entirely abandoned that it is impossible to trace the contract, and to say to what part of it the work shall be applied, in such case the workman shall be permitted to charge for the whole work by measure and value, as if no contract at all had ever been made. (i) But there must be a total deviation, so that the terms of the original contract are not applicable to the new work. (k)

Certain repairs were done to a vessel upon a special contract, which described the work to be done, and regulated the mode of payment; the repairs likewise had been estimated and the expense ascertained; and it was agreed that the expense should not exceed the sum of 620*l.*, payment to be made by instalments at stated periods. The original plan was subsequently varied, and other work was done by the defendant's orders out of the scope of the agreement, and beyond the repairs originally contemplated by the parties, and an action was brought upon an implied contract to pay the value of the whole of the work and labour actually done, without reference to the special contract; but it was urged, on the part of the defendant, that because there might be some excess of work agreed for beyond the special contract, or a slight deviation from the original plan, it was not, therefore, reasonable to let the whole contract loose, and to take from the defendant all the benefit of his previous stipulations; and the court held that the special contract must be the rule of payment as far as it extended and could be traced, and that for any excess of work

(h) *Ellis v. Hamlen*, 3 Taunt. 52.

(i) *Ld. Kenyon, C. J., Pepper v. Burland*,
Peake, 139.

(k) *Robson v. Godfrey*, 1 Stark. 275. *Ellis v. Hamlen*, 3 Taunt. 52. *Ross v. Lines*, 8 C. & P. 126.

performed under additional orders, independent of the special contract, the plaintiff might recover upon a *quantum meruit*, or implied promise to pay the value thereof. (*l*)

For all work indeed done *dehors* the contract, under subsequent or antecedent directions, the plaintiff may of course recover, just as if no special contract had ever been made. (*m*) But the mere fact of the defendants having assented to certain alterations is not sufficient to make him liable to pay for them as *extras* not covered by the contract, unless the alterations are of such a nature that he cannot fail to be aware that they must increase the expense, and cannot be done for the contract price. (*n*) “In cases of variation set up by way of defence, the courts look to the subsequent conduct of the parties, for this obvious reason, that as the parties intend the contract to remain in force, so far as it is not varied, it is only by comparing the conduct of the parties, subsequently to the making of the alleged variation with the terms originally agreed upon, that the court can determine with certainty upon oral evidence that such variations were mutually intended to take effect. (*o*)

SECTION IV.

OF IMPLIED CONTRACTS OF SALE, AND IMPLIED WARRANTIES AND PROMISES IN RESPECT OF GOODS SOLD.

If one man sends to the shop of another for food or clothing, or articles of merchandize, or enters an inn and takes refreshment, the law implies a contract or promise from him to pay a reasonable sum for the articles and refreshments received, though nothing has been said or stipulated concerning price or payment. If a man fraudulently makes use of another for the purpose of getting goods into his possession under a pretended contract of sale, putting forward a person whom he employs as the real purchaser, but secretly reserving to himself the benefit and advantage of the transaction, the law implies a promise from him to pay the unpaid vendor the price of the goods so sold. (*a*)

(*l*) *Robson v. Godfrey*, Holt. N. P. C. 236.
 (*m*) *Fletcher v. Gillespie*, 3 Bing. 637. *White v. Parkin*, 12 East, 576.
 (*n*) *Lovelock v. King*, 1 Mood. & Rob. 60.

(*o*) *Price v. Dyer*, 17 Ves. 364.
 (*a*) *Dallas, C. J. Abbotts v. Barry*, 2 B. & B. 371. *Parke, B.*, 1 C. M. & B. 490, 491.

A father falsely pretended to retire from business in favour of an infant son whom he introduced as his successor, stating that he should keep a watchful eye over him. Upon this representation, the plaintiffs supplied the son with goods to the amount of 800*l.*, and the son refusing to pay for these goods, and being exonerated from liability by reason of his minority, the plaintiffs brought their action against the father, who appeared still to exercise a control over the business; and it was held that if the father's statement to the plaintiff was false, and he continued, notwithstanding, to have a secret interest in the concern, he was liable upon an implied promise to pay to the plaintiffs the price of the goods as the real buyer and principal in the transaction. (*b*)

The defendant knowingly induced the plaintiff to sell goods to an insolvent, which goods were immediately afterwards made over to the defendant himself; and the court held that the law would imply a contract from the defendant to pay for the goods as the real purchaser, the insolvent, to whom the goods were in fact sold, appearing to have been the mere creature and agent of the defendant, and a mere man of straw in the transaction, made use of by the defendant to enable him to perpetrate a most nefarious fraud upon the plaintiff. (*c*)

If a special contract has been entered into for the sale and purchase of goods of a particular character, description, and quality, and the goods delivered are not of the same description as those bargained for and agreed to be sold, no action is, as we have already seen, (*d*) maintainable by the vendor upon the special contract, the terms and conditions thereof not having been fulfilled on his part; but if the purchaser neglects to return the articles delivered within a reasonable period, a new contract of purchase and sale arises by implication of law, totally distinct from, and independent of, the previous engagement, and the party who has received and retains possession of the goods is liable upon a *quantum meruit* to pay what the articles may reasonably be presumed to be worth. (*e*) "Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of the part delivered, because the purchaser may, if the vendor fails to complete his contract, return the part delivered. But if he retain the part delivered, after the seller has failed in performing his contract, the latter may recover the value of the

(*b*) *Biddle v. Levy*, 1 Stark. 20.

(*c*) *Hill v. Perrott*, 3 Taunt. 274.

(*d*) Ante, ch. 5, sec. 2.

(*e*) Parke, J., *Read v. Rann*, 10 B. & C. 441.

goods which he has so delivered," (f) upon a new contract and promise which the law then implies from the altered situation and circumstances of the parties.

Out of all express contracts of bargain and sale also arise certain engagements, implied by law as the natural consequences and incidents of the contract, although no mention has been made of them by the contracting parties. One of the first of these engagements is a promise or undertaking on the part of the vendor to put the vendee into possession of the thing sold without delay, if the contract makes no mention of the time of delivery, (g) and a promise or undertaking by the vendee to accept the goods, and pay the price on the delivery of the subject matter of the sale by the vendor. There is also an implied undertaking on the part of the vendor of a specific chattel to be delivered at a future day, to take the same care of it as of a thing borrowed for his own use, and he is responsible for the bad condition into which it may happen to fall through his own negligence or want of reasonable caution. (h)

By the civil law, if default was made by the buyer in performing his part of the contract, he was not only liable to an action for the price, but also on an implied undertaking to make a compensation to the seller for any special damage he might have sustained by reason of the buyer's breach of contract.

Implied warranties.—With a view to prevent fraud and deceit, and make men fair, and honest, and upright in their dealings and transactions, the law implies a general promise or undertaking from each of the parties, to a contract that he does not practise any deceit or fraudulent concealment to benefit himself at the expense of others. Thus in all sales and purchases of goods and chattels, the law implies an undertaking or promise from the vendor that he does not at the time of the sale know that his title to the goods is bad, and that he has no right to make the contract of sale he professes to make. (i) And if the vendor is cognisant of any defect, materially lowering the value of the goods in the market, the law implies a promise from him to make disclosure thereof to the intended purchaser, and the passing over in silence of an important fact or circumstance, which ought in good faith be made known, is equivalent, in contemplation of law, to an express representation, or even a

(f) Parke, J., *Oxendale v. Wetherell*, 9 B. & C. 388. *Mayor v. Pym*, 11 Moore, 2.

(g) *Imprimis ipsam rem præstare venditorem oportet id est tradere*, Domat. l. 4, tit. 2, § 2.

(h) *Atkinson v. Bell*, 8 B. & C. 283; 2 M. & R. 299, s. c.; Domat. l. 1., tit. 2, § 4, xxiv.

(i) *Peto v. Blades*, 5 Taunt. 657. So, by the civil law, if a man knowingly sold that which belonged to another, he was bound to indemnify the purchaser all the damage he had sustained. Domat. l. 1, p. 82.

warranty. (k) "If a taverner sell wine, *knowing* it to be corrupt, to another as sound and good wine, although he doth not expressly warrant it as such, yet an action lieth against him, for this was a warranty in law. And if a merchant sells cloth to another, knowing it to be badly fulled, an action lieth against him, because it is a warranty in law. (l) The declaration in action of assumpsit alleged that in consideration that the plaintiffs, at the request of the defendant, would buy a brig of the defendants, the defendants undertook and promised the plaintiffs that the brig was free from all latent and concealed defects, and alleged, as a breach of such promise, that the brig was not free from latent and concealed defects, and that the defendants, at the time of the making of the promise, *well knew the same*; and it was held that the action was maintainable. "In contracts of all kinds," observed Lord Kenyon, "it is of the highest importance that courts of law should compel the observance of honesty and good faith. This was a latent defect which the plaintiffs could not possibly discover, and which the defendants knowing of ought to have disclosed." (m)

It is usual, however, in actions brought upon implied promises and undertakings of this description, to allege in the declaration that the defendant undertook and promised the plaintiff that he did *not* know of the defect, and laying as a breach of such implied undertaking the defect in the article sold, and the defendant's knowledge of such defect. (n)

Sale with all faults.—If the purchaser agrees to take the subject matter of the sale "with all faults," there is an implied undertaking on the part of the vendor to resort to no device or contrivance to conceal a defect. "If I sell a horse that has lost an eye, no action lies against me for so doing, but if I sell him with a false and counterfeit eye, there an action lieth." (o) "The stipulation to be taken with *all faults* does not mean to be taken with *all frauds*," and the vendor will not be permitted to avail himself of it if he resorted to any artifice, or made use of any false representation, for the purpose of lulling to sleep the vigilance of a purchaser.

The hull of a vessel advertised to be sold was described in the printed particulars of sale to be "nearly as good as when launched," whereas the hull was at the time worm-eaten and quite unseaworthy, and the keel was broken. The captain, at the time the vessel was advertised to be sold,

(k) *Hill v. Gray*, 1 Stark. 435. *Jones v. Bowden*, 4 Taunt. 847.

(l) 1 Rolle's Abr. p. 90, pl. 1, 3, Keilw. 91, 16. *Southerne v. Howe*, 2 Rolle's rep. 5.

(m) *Mallish v. Mottaux*, 1 Peake, 156. This case has been overruled, so far as it relates to

"sales with all faults."

(n) Doug., 4th ed., p. 20. (n.)

(o) "Si j'eo vend chivall que ad null oculus la null action gist, auterment lou il ad un counterfeit faux et *bright eye*!" *Southerne v. Howe*, 2 Rolle, rep. 5.

removed her from the ways where she lay dry, and where the state of her bottom and keel might easily have been discovered, and kept her afloat where the defects were concealed by the water, and it was held that the vendor could not, after such an incorrect and fraudulent description had been given of the vessel, avail himself of a stipulation contained in the particulars of sale, that she "was to be taken with all faults." "The words," observes Mansfield, C. J., "are very large to exclude the buyer from calling upon the seller for any defect in the thing sold; but if the seller was guilty of any positive fraud in the sale, these words will not protect him. There might be such fraud either in a false representation, or in using means to conceal a defect. The agent tells us he framed the particulars without knowing anything of the matter. But it signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if in point of fact it turns out to be false." (p)

Implied promise to an absent purchaser to furnish the article described.

—The vendor, indeed, in all contracts of sale, impliedly undertakes to sell the article described by the purchaser, and not another and different article. If the latter, instead of going in person to a shop, and selecting the goods himself, sends an order describing what he wants, the vendor, if he accepts the order, must send an article which truly and honestly corresponds with the description given of it. (g) Thus, where a purchaser forwarded a written order to the vendor for "*scarlet cuttings*," to be shipped on his account for the Chinese market, and the vendor sent on board a different and inferior article, which was unsaleable in China, and did not correspond with the article known in the trade as scarlet cuttings, and the purchaser brought an action for the breach of an implied warranty, or undertaking on the part of the vendor to furnish the article he had ordered, it was holden that the action was maintainable, and that the plaintiff was entitled to recover from the vendor all the loss he had sustained in consequence of his not having had in China those goods which he had ordered, and which the vendor, by accepting the order and agreeing to the contract of sale, had impliedly undertaken to furnish. (r) So, where the purchaser bought in London twelve bags of "*waste silk*," then on its way from the continent to England, and directed

(p) Mansfield, C. J., *Schneider v. Heath*, 3 Campb. 508. *Baglehole v. Walters*, 3 Campb. 158. A representation or description amounts in many cases to an express warranty. See ante

p. 167.

(g) Best, C. J., *Jones v. Bright*, 3 M. & P. 175.

(r) *Bridge v. Wain*, 1 Stark. 504.

it to be sent down to him at Manchester, it was held that the contract of sale was accompanied with an implied undertaking, on the part of the vendor, to furnish an article fairly corresponding with the description given, and that the purchaser might maintain an action upon such implied undertaking to recover the damage he had sustained by reason of the vendor's having sent an inferior commodity, not saleable in the market, under the denomination of "waste silk." (*s*) So, again, where the purchaser sent an order in writing for "seventy-five barrels of best pork, branded Scott and Co.," a description of pork well known in the market as cured by Scott and Co., and paid the ordinary price for the article, and the vendor sent an inferior commodity, cured by another person, and branded "W.," it was held, that the vendor, by accepting the order, had impliedly undertaken to furnish the particular article specified, and that he was liable to an action upon such implied undertaking for the damage sustained by the purchaser by reason of his having sent another and a different article. (*t*)

If a shipowner sells a ship described as copper-fastened which is not copper-fastened, or if a diamond merchant sells a piece of cut glass or crystal for a diamond, or a silversmith sells plated goods for silver, or if a merchant sells wine or beer described as "fit," or ordered by the purchaser to be "fit for the Mediterranean" or "India market," and sends out a liquid which turns sour on the voyage, and is not saleable, on its arrival, as wine or beer, he is liable to an action for the breach of an implied undertaking, to furnish an article corresponding with the description given of it. (*u*) So, when an article is described through the medium of a sample, there is an implied undertaking that the bulk of the commodity corresponds with the sample given of it. (*x*)

Of the promise or warranty implied from a vendor who is told that the subject matter of the sale is required for a specific purpose.—If the vendor is informed that an article of a certain quality, character, or description, suited for some specified purpose, is required, the law implies a promise from him that he does *not*, at the time of the sale, *know* that the article is not of the requisite character and quality, and that it is unfit for the purpose for which it is required. If the vendor of a horse, for example, is told that the animal is wanted to carry a lady or a child, or a timid or infirm person, or to drive in a particular harness or carriage, the law implies a promise or undertaking from him that he does *not*, at the time

(*s*) *Gardiner v. Gray*, 4 Camp. 144.

(*t*) *Powell v. Horton*, 3 Sc. 110; 2 Bing. N. S. 668. s. c.

(*u*) *Fisher v. Samuda*, 1 Camp. 189. *Shep-*

herd v. Kain, 5 B. & Ald. 240. *Tye v. Finmore*, 3 Campb. 461.

(*x*) *Laing v. Fidgeon*, 6 Taunt. 108; 4 Campb. 169, s. c. *Hibbert v. Shee*, 1 Campb. 113.

he sells the horse, *know* that the animal is unfit for the purpose mentioned. (y)

The plaintiff sent to the shop of the defendant, who was a rope dealer, for a crane rope, and the defendant's foreman went to the plaintiff's premises and took the necessary measurement, saw the crane, and was told that the rope was wanted for the purpose of raising pipes of wine. The rope was brought and fixed, but it broke, and a cask of wine was precipitated into the street, and wholly lost; and it was held, that the defendant, by accepting the retainer and employment under the circumstances, had impliedly undertaken to furnish a rope reasonably fit for the purpose for which it was ordered, and was liable for the damage occasioned by its breaking, although he was not in fact the maker or manufacturer of it, he having employed a rope maker to execute the order, and the latter having, in his turn, employed a third manufacturer of ropes for the purpose. (z)

But the law does not imply from the mere seller of an article in its natural state, who has no better means of information than the purchaser, and who does not affirm that the article is fit for any particular purpose, any warranty or undertaking beyond the ordinary promise, that he makes no false representation calculated to deceive the purchaser, and practises no deceit or fraudulent concealment, and that he is not cognizant of any latent defect materially affecting the marketable value of the goods. (a) "In the general sale of a horse, the seller only warrants it to be an animal of the description it appears to be, and nothing more; and if the purchaser makes no inquiries as to its soundness or qualities, and it turns out to be unsound and restive, or unfit for use, he cannot recover as against the buyer, as it must be assumed that he purchased the animal at a cheaper rate." (b) And on the sale and transfer of wares and merchandize, if nothing is said as to the character or quality of the thing sold, the buyer takes the risk of all latent defects unknown to the seller at the time of the execution of the contract of sale; (c) all that the seller answers for is, that the article is, as far as he knows, what it appears to be.

The plaintiff bought a quantity of hops of the defendant, who was not the grower, by sample, taken from the pockets. At the time of the sale the bulk fairly answered to the sample, and no inherent defect was perceptible or known to the defendant, the vendor; but the grower, in order to increase the weight of the hops, had fraudulently watered them after they were dried. The effect of a proceeding of this kind did not usually become

(y) *Best, C. J., Jones v. Bright*, 3 M. & P. 175.

(z) *Brown v. Edgington*, 2 Sc. N. R. 497.

(a) *Bluellet v. Osborn*, 1 Stark, 384.

(b) *Best, C. J., Jones v. Bright*, 3 M. & P. 175.

(c) *Parkinson v. Lee*, 2 East, 313.

perceptible for several months; it was not known to the defendant at the time he sold the hops, but the defect became manifest a few months after the sale, whilst the hops remained in the plaintiff's possession, and rendered them unsaleable; and it was held, that there was no implied warranty on the part of the defendant that the hops were good, sound, and merchantable at the time he sold them, and that as the defendant had acted *bonâ fide*, he was not answerable for the loss. (d)

Of the promise or warranty implied from a vendor who manufactures and sells an article to be used for a specified purpose.—A manufacturer is presumed to have a reasonable knowledge of the article he makes; and the law implies a promise or undertaking from him, that all goods sold by him for a specific purpose, and to be used in a particular way, are reasonably fit and proper for the purpose for which he makes them, and for which they are known to be required. Thus, where a tradesman *manufactured* and sold copper *sheathing* for vessels, it was held that he impliedly warranted and undertook that the copper he manufactured was reasonably fit for the purpose of sheathing vessels, (e) because he had the means, by the exercise of proper care and skill, of knowing and ascertaining, during the process of smelting and manufacturing the metal, the quality of the ore, and its fitness for the purpose for which it was required, whilst the purchaser had no opportunity of discovering inherent defects, and must therefore necessarily rely to a reasonable extent on the judgment and skill of the manufacturer; and it would seem, indeed, that the mere *seller* of copper described as fit for sheathing vessels, would be bound to have, and would be presumed to have, a reasonable knowledge of the article so described and sold; and that the law would imply a warranty on his part, as well as on the part of the manufacturer, that the article was reasonably fit for the purpose specified. (f) But the law will confine the implied warranty or undertaking within moderate and reasonable limits, extending it so far only as may be necessary to do justice and preserve good faith. Thus, where the owner and proprietor of a certain patent invention, called "Chanter's smoke-consuming furnace," received an order from the defendant to send him "the patent hopper and apparatus to fit up" the defendant's "*brewing copper* with the smoke-consuming furnace;" and the furnace, when sent, was found to be unfit for the defendant's brewery, and unable to consume the smoke thereof, it was holden, that the law would imply no warranty that the machine was fit for the defendant's

(d) *Parkinson v. Lee*, 2 East, 313.

(e) *Jones v. Bright*, 3 M. & P. 155; 5 Bing. 538, s. c.

(f) *Abbot, C. J., Gray v. Cox*, 6 D. & R. 208; 4 B. & C. 108, s. c.

brewing-copper, and that the utmost that the vendor could be considered to undertake under such circumstances, was that the machine would consume smoke, which it appeared to have done in other instances when applied to a different purpose. "But," observes Lord Abinger, "if the vendor had said, I will send you one of my smoke-consuming furnaces, which will suit *your brewery*, in such a case that would be a warranty that it should suit the brewery." (g) So, where a barge was purchased of a barge-builder, who knew indirectly that the barge was required for the purpose of carrying cement by sea between Faversham and London, but received no distinct notice of the fact from the purchaser, and the barge, on her first voyage, was found to make so much water that the cement was damaged, and the purchaser was put to great expense in order to make her fit to carry cement, it was holden, that the meaning and extent of the warranty implied by law under such circumstances was, that the barge was reasonably fit for use as an ordinary barge, not that she was adapted for the peculiar service for which the purchaser required her. (h)

In an action for the price of a printing-machine, it appeared that the plaintiff had obtained a patent for a machine of which he was the inventor, which he called "Oliphant's patent two-coloured printing-machine," the object of which was to print calico of two colours; that the defendant, hearing of the invention, wrote to the plaintiff to know the price; when the latter in reply said, "I undertake to make you a two-colour printing-machine on my patent principle," stating the terms upon which he would do it; whereupon the defendant ordered a machine to be sent, and having got it, set it up on his premises, but could not make it print two colours, and found it perfectly useless to him; whereupon he refused to pay the price, contending that there was an implied warranty on the part of the plaintiff that the machine was fit and proper for the purpose for which it was designed; but it was held that, as the defendant had got a machine made on the plaintiff's "patent principle," he had got all he had bargained for, and was entitled to have, and that there was no implied undertaking that it would in the defendant's hands, and under his management, answer the purpose for which he wanted it. (i)

Implied warranties on the sale of provisions.—Every man who sells provisions, impliedly warrants them to be wholesome and fit for food. "If I come to a tavern to eat, and the taverner gives and sells me meat and drink corrupted, whereby I am made sick, an action lies against him with-

(g) *Chanter v. Hopkins*, 4 M. & W. 399.
Surplice v. Farnsworth, 8 Sc. N.B. 315. *Camac v. Warriner*, 9 Jurist, 162.

(h) *Shepherd v. Pybus*, 4 Scott, N. S. 444.
 (i) *Oliphant v. Bailey*, 13 Law J., N. S. (Q. B.) 54.

out any express warranty, because it is a warranty in law." (k) If a man contracts to supply victuals to a ship's crew, he impliedly warrants them to be good and wholesome, and fit for the sustenance of man.

SECTION V.

Of IMPLIED PROMISES in respect of "MONEY LENT,"—"MONEY PAID,"—"MONEY HAD AND RECEIVED,"—and an "ACCOUNT STATED."

Money lent.—From every loan of money naturally results an implied promise of repayment. (a) If the duration of the loan is not limited, and no terms and conditions are prescribed, the money is payable on demand. An acknowledgment of the receipt of money "to be accounted for," or that money "has been deposited" in the hands of the party sought to be charged as the borrower, is evidence of a loan, and so also is the payment of interest; (b) and the implied promise of repayment is not rebutted by the circumstance of a pledge being taken as a security for the repayment of the money. (c) If money has been advanced under a special contract, which has been abandoned and rescinded, and cannot be enforced, the law raises an implied promise from the person who holds the money, to pay it back as money lent, (d) if there has been nothing fraudulent or illegal in the transaction. (e)

Of the IMPLIED PROMISE in respect of MONEY PAID.

Whenever one man has expended and laid out his money for the use of another, by his authority or at his request, the law implies from the person on whose account and for whose use the money has been expended, a promise of repayment, in the absence of circumstances showing that the money was advanced as a gift.

The defendant being in want of some harness upon credit, asked the

(k) Year Book, 9 Hen. 6, 53; 1 Rolle Abr. 90. P. pl. 2.

(a) *Victors v. Davis*, 13 Law J., N. S. (Exch.) 214.

(b) *Harris v. Hunibach*, 1 Burr. 373. *Wasney v. Earnshaw*, 4 Tyr. 806. *Sutton v. Toomer*,

7 B. & C. 416; 1 M. & R. 125.

(c) *South Sea Company v. Duncomb*, Str. 919. *Lawton v. Newland*, 2 Stark. 73.

(d) *James v. Cotton*, 5 M. & P. 26; 7 Bing. 266, a. c. *Bristowe v. Needham*, 9 M. & W. 729.

(e) *M'Kinnell v. Robinson*, 3 M. & W. 434.

plaintiff to accompany him to a harness-maker, and assist in procuring it. The plaintiff accordingly went with the defendant, and induced the harness-maker to let the defendant have the harness upon credit, by an assurance which the plaintiff gave him in the defendant's presence, that if the defendant did not pay, he, the plaintiff, would. The defendant having made default, the plaintiff paid the money, and brought his action against the defendant to recover the amount so paid; and it was held, that as the defendant stood by and tacitly assented to the plaintiff's promise of payment, he must be taken to have given him an express authority in that behalf; and the plaintiff having acted upon this authority, the law would imply a promise from the defendant to repay the money, as being "money paid by the plaintiff for the use of the defendant at his request." (f)

When several persons together accept the situation of surety, and consent to share a common responsibility, there is, in the absence of an express agreement to the contrary, an understood authority from all to any one, and to each of them, to discharge the common burthen and liability, in case it should arise through the default of the principal; and if any one of the sureties pays the whole amount, for the payment of which they are all equally and alike subject, or more than his own share and proportion of the common burthen, the money paid by him over and above his own proportion, is money paid for the use of the other sureties at their request; and the law implies a promise from each of them individually to pay their several shares and proportions of the common burthen and responsibility. (g) If the surety who has paid his money has not paid more than his own share, then he has of course no claim against the others by way of contribution. (h) And the same rule prevails with regard to all joint contractors, not being partners, who have undertaken or have been made subject to a joint liability, and one of them has paid the whole or more than his own share and proportion of the common burthen, and has thus relieved his co-contractors from their liability, either wholly or in part. (i) If a party of friends, for example, meet to dine at a tavern, and give a joint order for dinner, and after dinner all but the plaintiff depart without paying, and the plaintiff pays for all, he may maintain an action against the others upon an implied promise to pay their several proportions of the joint liability; (k) and the same rule prevails, and the same implied pro-

(f) *Alexander v. Vane*, 1 M. & W. 511.

(g) *Kemp v. Finden*, 12 M. & W. 421. *Davies v. Humphreys*, 6 M. & W. 153. *Harbert's case*, 3 Co. 13 a., 15 b. *Pitt v. Purasord*, 8 M. & W. 538. *Browne v. Lee*, 9 D. & B. 700; 6 B. & C. 689, s. c. *Deering v. Earl of Winchester*, 2 B. & P. 273.

(h) *Geopel v. Swinden*, 13 Law J., N. S. (Q. B.) 113.

(i) *Burnell v. Minot*, 4 Moore, 342. *Prior v. Hendrow*, 8 M. & W. 873.

(k) Lord Kenyon, C. J., 8 D. & B. 614. *Hussey v. Crickitt*, 3 Campb. 173.

mise arises, where four persons jointly retain an attorney to defend them against a civil or a criminal charge, or to conduct an action or a prosecution on their behalf; and the plaintiff, one of the four, has paid the attorney's bill. (*l*)

In all actions for money paid, it is necessary, in the declaration of the cause of action, to state that the money was paid by the plaintiff for the use of the defendant at his *request*, and that the defendant, in consideration thereof, promised the plaintiff to pay him the amount so expended, for the law raises no implied promise in respect of a voluntary unauthorized payment, which the party was not called upon or required to make on behalf of another, "for no man can, by a voluntary payment of the debt of another, make himself that man's creditor, and recover from him the amount of the debt so paid;" the party on whose behalf the money is paid may have had good reason to resist the payment, and another person shall not pay it for him whether he will or no, and charge him with the repayment. (*m*) But the law, in order to sustain the necessary allegation that the money was paid by the plaintiff at the request of the defendant, will, under certain circumstances, imply the request as well as the promise, and so support a righteous and meritorious claim.

If the defendant, for example, by neglecting to pay money which he was by law bound to pay, has cast the duty and obligation upon the plaintiff, and the latter has paid the money, not voluntarily and officiously, but by compulsion of law, the compulsion so brought upon the plaintiff by the defendant is equivalent to an express request, and proof of such compulsion will support the necessary allegation in the declaration, that the money was paid by the plaintiff for the use of the defendant at his *request*. It has been held, for example, that a compulsion indirectly emanating from the defendant, amounted to a constructive request in the following cases:—where the carriage of the plaintiff was entrusted to the defendant, a coachmaker, to be repaired, and whilst standing on the defendant's premises was distrained by the landlord for rent due from the defendant; and the plaintiff, in order to redeem and get back his carriage, was obliged to pay the rent; (*n*)—where a sub-tenant paid, under a threat of a distress, a ground-rent to the original lessor, which ought to have been paid by his own immediate landlord; (*o*)—also where a tenant was compelled to pay other outgoing and burthens on the land, which ought by law to have been paid by the lessor; (*p*)—where an executor paid a legacy

(*l*) *Edge v. Knapp*, 7 Sc. N. R., 707, 713.
Holmes v. Williamson, 6 M. & S. 158.

(*m*) Lord Kenyon, 8 T. R. 310, 613. Lawrence, J., ib. 311. *Stokes v. Lewis*, 1 T. R. 21.

(*n*) *Exall v. Partridge*, 8 T. R. 308.

(*o*) *Sapford v. Fletcher*, 4 T. R. 512.

(*p*) *Baker v. Greenhill*, 3 Ad. & E. N. S. 148.

in full, inadvertently omitting to deduct the legacy duty, which he is required by act of parliament to deduct and pay to the crown, and was afterwards compelled to pay such duty, the statute declaring, that in case the executor omits to deduct the duty, such duty shall become a debt due to the crown from both the executor and the legatee; (*q*)—where the defendant employed the plaintiff, a sharebroker, to sell shares for him, and by mistake directed the plaintiff to sell 250 shares, meaning 50, and the plaintiff sold the shares; and before the arrival of the time appointed for the transfer and delivery of them, the price advanced, and the broker was obliged to buy 200 shares at the advanced price, to make good the requisite number, and pay the loss on the transaction out of his own pocket; (*r*)—where the defendant placed in the hands of the plaintiff, a stockbroker, for sale, certain securities, purporting to be genuine and available Guatemala bonds, saleable on the Stock Exchange, and the plaintiff sold them, and received the purchase-money, and handed it over to the defendant; after which it was discovered that the securities were spurious documents, perfectly worthless and unsaleable, and the stockbroker was obliged to take back the bonds, and refund the money; and the action was brought by him to recover from the defendant the amount previously paid him; (*s*)—where the plaintiff, a carrier, by mistake, delivered to the defendant goods consigned to a third party, and the defendant appropriated the goods to his own use, and the carrier was obliged to pay the value of them to the consignor; (*t*)—where the defendant obtained possession of goods intrusted to the plaintiff to be sold at a fixed price, upon the terms that he should either re-deliver them to the plaintiff, or pay the price within a limited period, and the defendant refused to do either; and the plaintiff being threatened with an action, paid the price to the owner, and the action was brought to recover the amount so paid; (*u*)—where the plaintiff had entered into a deed of composition with his creditors, upon the terms that they should receive ten shillings in the pound, and the defendant refused to sign the deed without receiving security for the payment of the residue of the debt; and the plaintiff privately gave the defendant his promissory note for the remainder of the debt, upon the terms that he should keep such note in his own hands; and the defendant, in breach of his agreement to that effect, negotiated the note, and the plaintiff was compelled to pay the amount thereof to the indorsee. (*x*)

(*q*) *Hales v. Freeman*, 4 Moore, 21; 1 B. & B. 391, s. c. *Foster v. Lay*, 2 Sc. 438; 2 Bing. N. S. 269, s. c.

(*r*) *Sutton v. Tatham*, 10 Ad. & E. 27. *Pawle v. Gunn*, 6 Sc. 286.

(*s*) *Young v. Cole*, 4 Sc. 489; 3 Bing. N. S.

730, s. c.

(*t*) *Brown v. Hodgson*, 4 Taunt. 189.

(*u*) *Longham v. Kenny*, 1 Doug. 137.

(*x*) *Horton v. Riley*, 11 M. & W. 492. *Bradshaw v. Bradshaw*, 9 M. & W. 29. *Smith v. Cuff*, 6 M. & S. 160.

—where the plaintiff agreed to grant the defendant a lease, and the lease was prepared by the plaintiff's solicitor, and the plaintiff was obliged to pay for the lease by reason of the defendant's refusal so to do, it being shown that, according to the usual course of business in such cases, the lessor's solicitor prepared the lease, and the lessee paid the expense of it. (y)

The law also raises an implied promise in respect of money paid in the following cases :—where the plaintiff, at the request of the defendant, has become surety for him for the payment of money, and the plaintiff, by reason of the neglect of the defendant to pay at the time appointed, is compelled to pay the debt out of his own pocket ; (z) where the defendant accepts a bill of exchange for the accommodation of the defendant, from motives of kindness, and without value or consideration, to assist the defendant in negotiating the bill or note, and getting it discounted for his benefit, and the plaintiff is obliged to pay the bill when it comes to maturity, by reason of the defendant's neglect to provide the necessary funds for the purpose ; also where the plaintiff indorses a bill or a promissory note for the accommodation and benefit of the defendant, and is obliged to pay the amount thereof ; (a)—also where the acceptor neglects to pay a bill when due, and the plaintiff as indorser is compelled by the holder to pay him part of the amount. (b) In all cases it is sufficient, if the party paying the money shows that the legal obligation was cast upon him by the default of the defendant, and that the law compelled him to do what he has done, he need not wait for the actual issue of legal process, or abide the result of an action, in order to establish the fact of the compulsion. (c)

But it has been held that if a party makes a voluntary payment in satisfaction and discharge of some disputed claim, with full knowledge of the facts, but under ignorance of the law, and from a mistake and misapprehension of his legal liability, and no fraud or concealment or wilful misrepresentation has been resorted to by the other side to induce the payment, the law will not help the party so paying the money to recover it back. (d) If an action, for example, has been commenced to enforce a claim put forward by the plaintiff, and the defendant settles the action,

(y) *Grissell v. Robinson*, 3 Sc. 329 ; 3 Bing. N. S. 10, s. c.

(z) *Fisher v. Fellows*, 5 Esp. 171 ; Lord Kenyon, 8 T. R. 310.

(a) *Bleaden v. Charles*, 5 M. & P. 14 ; 7 Bing. 246, s. c. *Seaver v. Seaver*, 6 C. & P. 673. *Reynolds v. Doyle*, 2 Sc. N. B. 45. *Horton v. Riley*, 13 Law J., N. S. Excheq. 81.

(b) *Pownall v. Ferrand*, 9 D. & R. 607 ; 6

B. & C. 439.

(c) *Maydew v. Forrester*, 5 Taunt. 615. *Austen v. Ward*, R. & M. 116. *White v. Leroux*, 1 Moo. & Malk. 349.

(d) *Bilbie v. Lumley*, 2 East, 469. *Brisbane v. Dacres*, 5 Taunt. 143. *Kelly v. Solari*, 9 M. & W. 58 ; *Parke, B.*, 12 M. & W. 186 ; *Tindal, C. J.*, *Parker v. Gt. West. Rail. Co.*, 7 Sc. N. B. 874.

and pays money in satisfaction and discharge of such claim, and then discovers that the claim was unfounded, and that there was no cause of action, he cannot recover back the money on the ground that it was paid by mistake; for there would be no end to litigation if that were to be permitted, and disputed questions and transactions so settled and adjusted were to be opened afresh. (*f*) It is otherwise, however, if the party making the claim knows it to be unfounded, and wrongfully makes use of the process of the law for purposes of oppression and extortion. (*g*) "The rule also has always been that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again; as where a man has paid a debt, which was barred by the Statute of Limitations; or a debt contracted during infancy, which in justice he ought to discharge, though the law would not have compelled the payment, yet the money being paid, it will not oblige the payee to refund it." (*h*) The law also will raise no implied promise out of a transaction which has been a breach of duty, and will give no assistance towards the recovery of money paid in furtherance of an illegal or immoral purpose. (*i*)

Of the IMPLIED PROMISE, in respect of MONEY HAD AND RECEIVED.

Money received through mistake.—If a man, through some mistake or misapprehension or forgetfulness of facts, has received money to which he is not justly and legally entitled, and which he ought not, *in foro conscientie*, to retain, the law regards him as the receiver and holder of the money for the use of the lawful owner of it, and raises an implied promise from him to pay over the amount to such owner. (*k*) It has been held, for example, that the defendant was indebted to the plaintiff in respect of "money had and received by the defendant for the use of the plaintiff," and that the law consequently would imply a promise from the defendant to the plaintiff to pay him the amount received in the following cases:—where a contract was entered into for the sale of merchandize, at a price to be calculated according to weight, and an error took place in the weighing, and the goods were reported to be of greater weight than they really were, and the price was calculated and paid by

(*f*) *Marriot v. Hampton*, 7 T. R. 269. *Goodman v. Sayers*, 2 J. & W. 263. *Hamlet v. Richardson*, 2 M. & Sc. 811; 9 Bing. 644, s. c. *Knibbs v. Hall*, 1 Esp. 84.

(*g*) *Duke de Cadaval v. Collins*, 4 Ad. & E. 858; 6 N. & M. 324, s. c.

(*h*) Per Lord Mansfield, *Bize v. Dickason*, 1 T. R. 286.

(*i*) *Pitcher v. Bailey*, 8 East, 173.

(*k*) *Kelly v. Solari*, 9 M. & W. 58. *Lucas v. Worswick*, 1 Moo. & Rob. 293. *Milnes v. Duncan*, 9 D. & R. 735; 6 B. & C. 677, 678. The same rule prevails in France and other countries, borrowed from the civil law. French Code Civile, tit. 4 liv. 3, art. 1376; Instit. lib. 3, tit. 28, § vi. vii.

the plaintiff to the defendant according to such false reckoning, and the action was brought to recover the amount of the overpayment; (*l*)—where silver was sold in bars, at a price to be calculated according to the number of ounces of pure silver contained in each bar, to be determined by an assay of the metal, and a mistake was made by the assay master, and the plaintiff in consequence thereof paid the defendant for a greater quantity of silver than each bar was found subsequently to contain, and the action was brought to recover the amount of such overpayment; (*m*)—where the plaintiff had paid rent to the defendant, and it afterwards appeared that the defendant had no right to receive such rent, and the action was brought to recover it back, the title to the land not coming into question, and not being sought to be tried in such action; (*n*)—where money had been paid by the plaintiff to the defendant for the use of fixtures in a dwelling-house, which fixtures were found to belong to the landlord and not the defendant; (*o*)—where money was paid by the plaintiff to the defendant for the purchase of a leasehold estate, and it afterwards appeared that the defendant had no title to the lease, and the plaintiff was ejected from the land. (*p*)

Money improperly received and wrongfully detained.—If one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, such money is, in contemplation of law, money received for the use of the injured party, it is not the money of the wrong doer, he has no right to retain it; and the law therefore implies a promise from him to return it to the lawful owner, whose title to it cannot be destroyed and annulled by the fraudulent and unjust dispossession. It has been held, therefore, that the defendant is indebted to the plaintiff in respect of "money had and received by the defendant for the use of the plaintiff, and that the law will raise an implied promise of payment in the following cases:—where a man having a claim or lien to a certain amount on goods and securities in his possession, unlawfully refuses to give them up without receiving more than he is strictly entitled to claim, or having no lien at all upon them, wrongfully refuses to give them up without being paid for so doing, and the owner, in order to get the goods or securities, is obliged to satisfy and discharge the extortionate demand; (*q*)—where a married man, pretending to be

(*l*) *Cox v. Prentice*, 3 M. & S. 349.

(*m*) *Ib.* 349, 350.

(*n*) *Newsome v. Graham*, 10 B. & C. 234,
238. *Monypenny v. Bristol*, 2 Russ. & Mylne,
117. The courts will not suffer a title to land
to be tried in an action for money had and re-

ceived. *Marshall v. Hopkins*, 15 East. 313,
314. *Clarance v. Marshall*, 2 C. & M. 495.
Decharms v. Horwood, 4 M. & Sc. 400.

(*o*) *Robinson v. Anderton*, 1 Peake, 129.

(*p*) *Cripps v. Reade*, 6 T. R. 606.

(*q*) *Astley v. Reynolds*, 2 Str. 915. *Shaw v.*

single, marries a lady, and under colour of such pretended marriage, gets possession of her estates, and receives the rents; (*r*)—where one man takes and wrongfully sells the goods of another, (*s*) or exacts usurious and illegal payments from a distressed debtor, (*t*) or claims or receives rents or money under a false or pretended authority; (*u*) or wrongfully usurps the office of another, and receives the fees annexed thereto, (*x*) or receives a masquerade ticket to be *sold* or redelivered, and refuses to redeliver it, the presumption being in such a case that he has sold it and received the money. (*y*) The action upon such implied promise lies also against an agent, who wrongfully demands and receives money in the name and on behalf of his principal, although he may have paid the money over to the latter; (*z*) or an attorney, who wrongfully exacts money, either on his own account, or on behalf of his client, as the price of the liberation of deeds or securities, unjustly and illegally detained by him on behalf of such client; (*a*) or a vestry clerk, who wrongfully receives and detains, by the direction of the vestry, burial fees which belong to the rector; (*b*) or a steward of a manor, who demands and receives an extravagant charge, as the condition of his producing deeds and court rolls in his custody, which the party paying the money could not do without, and which the steward ought to have produced on tender of a reasonable compensation; (*c*) or a broker in possession of goods under a distress, who demands and receives unauthorised and excessive charges; (*d*) or a sheriff who exacts a larger fee than the law allows for executing the Queen's writ; (*e*) or a justice of the peace, who exacts a fee from a publican as the condition of granting him a license; (*f*) or a toll collector, who exacts an illegal or unauthorised toll; (*g*) or an overseer of the poor, who levies money by seizing and selling goods upon a magistrates' conviction, which is afterwards quashed; (*h*) or a revenue

Woodcock, 9 D. & B. 889, 892. *Wakefield v. Newbon*, 13 Law J., N. S. (Q. B.) 260.

(*r*) *Hauser v. Wallis*, Salk. 28.

(*s*) *Foster v. Stewart*, 3 M. & S. 202.

(*t*) *Bosanquet v. Dashwood*, cited 2 Doug. 697 b.

(*u*) *Heath, J., Lightly v. Clouston*, 1 Taunt. 414. *Bonnell v. Foulke*, 2 Sid. 4. *Robson v. Eaton*, 1 T. R. 62. *Dupen v. Keeling*, 4 C. & P. 102.

(*x*) *Howard v. Wood*, 2 Lev. 245; 2 Jon. 127, s. c. *Arris v. Stukely*, 2 Mod. 260. *Holt, C. J., Pollard v. Gerard*, 1 Raym. 703.

(*y*) *Longchamp v. Kenny*, 1 Doug. 137.

(*z*) *Snowdon v. Davis*, 1 Taunt. 359.

(*a*) *Smith v. Steap*, 12 M. & W. 588. *Wakefield v. Newbon*, 13 Law J., N. S. (Q. B.) 258—

268. But a person who merely receives money as an agent or attorney is not liable. *Stephens v. Badcock*, 3 B. & Ad. 354. *Howell v. Batt*, 5 B. & Ad. 504. The action must be brought against the client or the principal. *Bamford v. Shuttleworth*, 11 Ad. & R. 926.

(*b*) *Spry v. Emperor*, 6 M. & W. 639.

(*c*) — *v. Pigott*, cited 2 Esp. 723.

(*d*) *Hills v. Street*, 2 M. & P. 103.

(*e*) *Dew v. Parsons*, 2 B. & Ald. 562.

(*f*) *Morgan v. Palmer*, 2 B. & C. 729; 4 D. & B. 283, s. c.

(*g*) *Lewis v. Hammond*, 2 B. & A. 206. *Waterhouse v. Keen*, 4 B. & C. 200; 6 D. & B. 257, s. c.

(*h*) *Feltham v. Terry*, Bull. N. P. 131 a.; cited 1 T. R. 387; 1 Cowp. 419

officer, who unlawfully seizes goods as forfeited, and unlawfully detains them, and takes money which he has no right to take, as the condition of their release; (*h*) or a nurse, who, upon the death of a person she attended, carried away his money (*i*) or a creditor, who has received money as the condition of his signing a bankrupt's certificate; (*k*) or who has openly joined other creditors in executing a deed of composition with a debtor consenting to take a composition of 10*s.* in the pound, but has privately stipulated for and accepted payment of the residue of his debt, and the action is brought to recover back the amount so paid, the payment being fraudulent and deceitful as regards the other creditors, who executed the deed upon a general understanding that they were all to stand on the same footing, and that one was not to receive more than the other. (*l*) The action upon such implied promise lies, moreover, against all persons who extort money for doing what they are by law bound to do without payment or reward, (*m*) and who receive and have in their possession and wrongfully detain the money of another; (*n*) "for," as it has been justly observed, "no man will venture to take, if he knows that he is liable to refund." (*o*)

Money received upon a consideration that has failed.—The law raises also an implied promise to pay back money that has been received without consideration, or upon a consideration that has failed, and an action may be maintained upon such implied promise to recover back money paid for an annuity which has been set aside, or has become void for want of registry or inrolment; (*p*)—also to recover money paid to an auctioneer as a deposit on the sale of an estate, when the title is defective, and the purchase consequently cannot be completed; (*q*) or if the estate does not correspond with the description given of it in a printed particular; (*r*)—also to recover money received as a consideration for a lease by a person who is subsequently found to have no right or title to grant the lease, (*s*) or paid on a conditional sale which has been abandoned or rescinded, and the goods returned; (*u*) or on a purchase when the thing contracted for

(*h*) *Irving v. Wilson*, 4 T. R. 485. *Abinger, C. B., Atlee v. Backhouse*, 3 M. & W. 645.

(*i*) *Whip v. Thomas*, Bull. N. P. 130 a.; and cited 1 Burr. 458.

(*k*) *Smith v. Bromley*, Doug. 697 in notis. *Sievers v. Boswell*, 4 Sc. N. R. 173.

(*l*) *Bradshaw v. Bradshaw*, 9 M. & W. 29. *Smith v. Cuff*, 6 M. & S. 160.

(*m*) *Parker v. Gt. West. Rail., Co.* 7 Sc. N. R. 335, 374.

(*n*) *Scott v. Crawford*, 5 Sc. N. R. 781. *Hall v. Swansea*, 13 Law J., N. S. (Q. B.) 107. *Randall v. Bell*, 1 M. & S. 722. *Edmeads v. Newman*,

2 D. & R. 578; 1 B. & C. 418, s. c. *Astle v. Thomas*, 3 D. & R. 492.

(*o*) *Jones v. Barkley*, 2 Doug. 690.

(*p*) *Shove v. Webb*, 1 T. R. 732. *Scurfield v. Gowland*, 6 East, 241. *Davis v. Bryan*, 6 B. & C. 656; 9 D. & R. 726, s. c. *Huggins v. Coates*, 13 Law J., N. S. (Q. B.) 46.

(*q*) *Burrough v. Skinner*, 5 Burr. 2639.

(*r*) Ante, p. 116, notes (*m*) and (*n*).

(*s*) *Cripps v. Reade*, 6 T. R. 606.

(*u*) *Hurst v. Orbell*, 8 Ad. & E. 107. *Cahoon v. Burford*, 13 Law J., N. S. Exch. 265. *Street v. Blay*, 2 B. & Ad. 462.

was not delivered; (x) or money paid as a premium upon a policy of insurance, when the risk insured against was not run; (y) or money paid on a bill of exchange to a person who gave no consideration for the bill; (z) or to the promoters of a scheme or project, who promise to carry out their plan for the benefit of the subscribers, but who afterwards abandon it without their consent; (a) or money paid to parish officers for the support of a bastard child, when the child dies before the money has been expended; (b) or to the holder of a bill, or bank note, or other security, who has presented it to the plaintiff to be discounted, and got the money, and the bill turns out to be a forgery. (c) The action also may be maintained to recover back money received under a special contract which has been abandoned or rescinded, or the performance of which has been prevented by the wrongful act of the party who has received and retains possession of the money. (d)

Money received under an illegal contract where there is a LOCUS PENITENTIE, or the parties do not stand IN PARI DELICTO.—The law also, so long as an illegal contract continues *executory*, implies from the person who has received money in furtherance of the execution of the contract, a promise to refund it, and an action upon this implied promise may be maintained against a person who has received money upon an illegal insurance or wager, at any time before the happening of the event which is to decide the adventure; (e)—also against a stakeholder with whom money has been deposited to abide the event of an illegal wager, who has not paid over the money to the winner, or who pays it over after he has received notice not to do so from the party who has deposited the money in his hands; (f) and against parish officers who wrongfully receive money under an illegal contract, although they have quitted office, and handed over the money received to their successors. (g)

The law also implies a promise to refund money had and received under an illegal contract, where the plaintiff seeking to recover such

(x) Anon. 1 Str. 407, *Wright v. Newton*, 2 C. M. & R. 127.

(y) *Stevenson v. Snow*, 3 Burr. 1240.

(z) *Cobden v. Kendrick*, 4 T. R. 432.

(a) *Nockells v. Crosby*, 5 D. & R. 751; 8 B. & C. 824, s. c. *Kempson v. Saunders*, 4 Bing. 5; 12 Moore, 44, s. c.

(b) *Chappell v. Poles*, 2 M. & W. 867.

(c) *Jones v. Ryde*, 5 Taunt. 488; 1 Marsh. 163, s. c. *Wilkinson v. Johnston*, 3 B. & C. 428; 5 D. & R. 403, s. c.

(d) *Towers v. Barrett*, 1 T. R. 133. *Giles v. Edwards*, 7 T. R. 180. The action is not maintainable if the contract is open and unre-

scinded. *Weston v. Downes*, Doug. 23 a.; and it will not lie to recover money received by trustees so long as the trust remains open. *Cass v. Roberts*, Holt N. P. C. *Edwards v. Bates*, 13 Law J., N. S. C. P. 156, 158.

(e) *Clark v. Shee*, Cowp. 197. *Tenant v. Eliot*, 1 B. & P. 8. *Farmer v. Russell*, ib. 296. *Tappenden v. Randall*, 2 B. & P. 467.

(f) *Hodson v. Terrill* 1 C. & M. 797; 3 Tyr. 929, s. c. *Robinson v. Mearns*, 6 D. & R. 26. *Hastelow v. Jackson*, 8 B. & C. 221. *Pickard v. Banks*, 13 East, 20.

(g) *Chappell v. Poles*, 2 M. & W. 867.

money does not stand *in pari delicto* with the defendant from whom it is sought to be recovered. Where contracts, for example, are prohibited by statute, for the purpose of preventing one set of men from taking advantage of the necessities of others, and money is paid upon such contracts by one of those whom the law intended to protect, the party who has so paid his money does not stand *in pari delicto* with the person who has received it, and may after the forbidden transaction is finished, and completed, bring an action upon a promise implied by law from the person who has got the money to refund it. (*h*) An action upon such implied promise may be maintained to recover back money privately paid to a creditor to induce him to sign a bankrupt's certificate, (*i*) or money paid to the indorsee of a bill of exchange originally given to a creditor to induce him to sign a composition deed, (*k*) or the excess of interest exacted from the plaintiff on an usurious loan to him, (*l*) or money paid to a lottery-office keeper for insuring tickets contrary to the statute. (*m*)

Of the IMPLIED PROMISE in respect of an ACCOUNT STATED.

If an account has been stated between several persons mutually interested in the subject matter of such account, the law implies a promise or undertaking on the part of those against whom the balance appears, to pay over the amount of such balance to the others, though there be not any actual promise to that effect; and any clear or distinct admission made either orally or in writing by the defendant of a sum certain being due from him to the plaintiff, will support the allegation of an "account stated," and raise an implied promise to pay over to the plaintiff the amount admitted to be due, (*n*) unless it can be shown that the admission was the result of mistake and misapprehension, and is untrue. An I O U, consequently, being a distinct admission of a sum due, is evidence of an account stated, and the law implies from such an admission, a promise to pay over the amount mentioned in the document to the person who is in possession of it. (*o*)

(*h*) *Williams v. Hedley*, 8 East, 378.

(*i*) *Lowry v. Bourdieu*, 2 Doug. 472.

(*k*) *Nerot v. Wallace*, 3 T. R. 25. *Smith v. Cuff*, 6 M. & S. 165, 166. *Alsager v. Spalding*, 4 Bing. N. S. 407; 6 Scott. 204.

(*l*) *Smith v. Bromley*, 2 Doug. 697 b.

(*m*) *Jacques v. Wilby*, 1 H. Bl. 65; 2 Bl. R. 1078. *Clarke v. Shee*, Cowp. 197. *Browning v. Morris*, id. 790. *Clayton v. Dilly*, 4 Taunt. 165. *Thistlewood v. Cracroft*, 1 M. & S. 502. See further as to the parties entitled to sue in respect of money had and received, post. ch. 9, sec. 2.

(*n*) *Knowles v. Michel*, 13 East, 249. *Eicke v. Nokes*, Mood. & Rob. 359. *Prouting v. Hammond*, 8 Taunt. 688; Gow, 41, s. c. *Ashby v. Ashby*, 8 M. & P. 186. *Porter v. Cooper*, 1 C. M. & R. 394-5. *Davies v. Wilkinson*, 10 Ad. & E. 98. *Highmore v. Primrose*, 5 M. & S. 65. *Wheatley v. Williams*, 1 M. & W. 541. *Chisman v. Hawley*, 2 Sc. N. R. 569. *Pardon v. Purdon*, 10 M. & W. 562. *Lubbock v. Tribe*, 3 M. & W. 613.

(*o*) *Payne v. Jenkins*, 4 C. & P. 324. *Curtis v. Richards*, 1 Sc. N. S. 155; 1 Man. & Gr. 46, s. c.

The law also will imply a promise to pay over money in respect of an account stated, when there has been a statement of accounts in the presence of the defendant, and an admission by the latter of the balance being against him, without any specification or acknowledgment of the amount of such balance; (*p*)—also, where the drawer of a bill over-due and unpaid, has promised to pay the indorsee and holder the amount of such bill. (*q*) Also where partners have come to a settlement of accounts, which is meant to be a final settlement up to a particular period, and upon the face of such accounts there is an ascertained balance admitted to be due from the one partner to the other. (*r*)

(*p*) *Rigby v. Jeffrys*, 7 D. & R. 561. *Dixon v. Deveridge*, 2 C. & P. 109.

(*q*) *Oliver v. Dovalt*, 2 M. & Rob. 230.
(*r*) *Wray v. Milestone*, 5 M. & W. 24.

CHAPTER VIII.

OF THE PLAINTIFFS IN ACTIONS EX CONTRACTU.

SECTION I.—Deeds—Of the ancient maxim of the common law that a stranger to a deed *inter partes* cannot sue thereon—Alteration of this rule by stat. 7 & 8 Vict. c. 76—Abrogation of the distinction between deeds *inter partes* and deeds *poll*—The action upon a deed must be brought by the party with whom the contract is in terms made—When the person beneficially interested may sue in the name of such party—Of the right of action of covenantees who have omitted to execute the deed.

SECTION II.—Simple contracts—The right of action upon simple contracts not confined to the parties to such contracts—Nor to the person with whom the contract is in terms made—Of the rule of law that a stranger to the consideration upon which a simple contract is founded cannot maintain an action upon such contract—When the consideration moves from the plaintiff and when the party beneficially interested may sue upon a contract made with another person in his behalf and for his benefit—Of a consideration performed by a parent for the benefit of his child—Of the plaintiffs in actions against bankers and depositaries of money—Warehousemen and wharfingers—Bailees of goods and carriers.

SECTION I.

OF THE PLAINTIFFS IN ACTIONS UPON DEEDS.

Of the rule of law that a STRANGER to a DEED inter partes cannot sue thereon.—It has always been a fixed rule of the common law, that a stranger to a DEED *inter partes* cannot maintain an action upon the deed.

If a deed, for example, was expressed to be made between certain persons named in the premises of the instrument or described therein as the contracting parties, those persons only and their privies claiming through them by blood, representation, or otherwise, could take advantage of the

deed by way of action. It mattered not that the deed was made for the exclusive benefit of other individuals named therein, and contained covenants with them for the performance of certain duties, if they had not been made parties to the contract, they could not sue thereon, although they might have sealed and delivered the deed in common with those who were formally described as the parties to the instrument. (a)

Certain articles of agreement under seal, for example, were made "between Thomas Warren, fully authorized on behalf of Elizabeth Gilby (the plaintiff) of the one part, and Lionel Copley (the defendant) of the other part, in which it was recited that Warren had sold to the defendant 448 sheep, the property of the said Elizabeth Gilby, in consideration whereof the defendant had paid in hand one shilling to the said Warren, and did promise to pay to the said Elizabeth Gilby, the plaintiff, £210 for the said 448 sheep, on the 16th of June next following, and upon demurrer, it was held by Levinz, J., that the action should have been brought by Warren, and that the plaintiff, Elizabeth Gilby, not having been a party to the deed, could not sue thereon. (b)

An agreement under seal was made between Bartlett and the defendant of the one part, and Pitts of the other part, wherein Bartlett and the defendant promised and agreed with Pitts, his executors and administrators, that they would pay him an annuity for twenty-one years, or in case of his death within the term, unto and for the use of his child or children. Pitts died within the term, leaving one daughter, who also died within the term intestate, and the administrator of the daughter brought an action on the deed for the non-payment of the annuity, but it was held, that he could not recover, as the contract on the face of the deed was with Pitts, his executors and administrators, and no one else, and the daughter of the deceased Pitts was no party to the deed, nor privy thereto, although on the happening of a certain event, she would take a beneficial interest; that the administrator of Pitts, therefore, was the party in whom the legal interest in the contract was vested, and who ought to have sued upon the deed, and if he had refused to sue, a court of equity would have compelled him to lend his name, and having recovered the arrears of the annuity, he would be held a trustee for the daughter, and would have been bound to pay over the money to her next of kin. (c)

A landlord authorized his agent by writing, not under seal, to execute a lease on his (the landlord's) behalf. An indenture of lease was there-

(a) *Quick v. Ludburrow*, Rolle rep. 196.
Windemore v. Hubbard, id. 58. *Wickham v. Hawker*, 7 M. & W. 63.

(b) *Gilby v. Copley*, 3 Lev. 188.

(c) *Barford v. Stuckey*, 5 Moor, 23; 2 B. & B. 333, a. c.

upon signed and sealed by the agent in his own name, but it was expressed to be made between T. (the agent,) for and on behalf of B. (the landlord,) of the one part, and the tenant of the other part. All the covenants were made between the tenant and the landlord, and the latter, therefore, brought his action upon them; but it was held, that as the deed was *inter partes*, and the landlord had not been made a party to it, he could not sue thereon, although the covenants were expressed to be made with him, and the deed had been entered into in his behalf and for his express benefit. (d)

A deed was made between J. and C. Drummond of the first part, the Dowager Baroness Southampton, the guardian of the plaintiff, of the second part, and the defendant of the third, whereby certain premises were demised by the said J. and C. Drummond, with the assent of the Baroness, to the defendant, at a yearly rent, to be paid to the plaintiff and the heirs male of his body, and the defendant covenanted with the plaintiff and with the said J. and C. Drummond, to pay the rent and repair; and it was held, that the plaintiff could not join in an action against the defendant upon these covenants, as he was no party to the deed. (e)

A deed of composition with creditors was expressed to be made between a debtor of the first part, his surety of the second part, and the several other persons whose hands and seals were set and subscribed thereto, being creditors, of the third part. The deed contained covenants with the said several creditors, parties thereto, and to and with their and *each and every of their partners in trade*. Metcalf, one of the members of a firm in partnership who were creditors, subscribed the deed in the name and firm of himself and partner, viz. "*Farrar and Metcalf*," and set his seal thereto; and it was held, in an action brought upon the deed, that as Farrar had not affixed his own hand and seal to the deed, so as to constitute himself a party according to the terms of the instrument, he could not join his partner Metcalf in suing thereon. (f)

And where an indenture of charter party was made between the plaintiffs, owners of the good ship called B., whereof one Robert Pitman was master, of the one part, and the defendant of the other part, in which indenture the defendant entered into covenants with the plaintiffs *and Pitman the master*, and an action was brought upon these covenants by the plaintiffs against the defendant, who pleaded a release from *Pitman*, it was held, that such release could be no bar to the action, as Pitman

(d) *Berkeley v. Hardy*, 8 D. & R. 102; 5 B. & C. 355.

718.

(e) *Lord Southampton v. Brown*, 6 B. & C.

(f) *Metcalf v. Rycroft*, 6 M. & S. 75.

had not been made a party to the indenture, and that where an indenture was reciprocal between parties on the one side and parties on the other side, no bond, covenant, or grant could be made to or with any that was not a party to the deed. (g)

Deeds Poll.—But when a deed was not made reciprocal between parties of the one part, and parties of the other part, but was expressed to be made generally “to all” in the nature of a deed poll, then, if any one or more persons contracted or covenanted therein with a stranger, the latter might bring an action upon the deed against the parties so covenanting and contracting, provided they had duly sealed and executed the instrument. (h) Thus where an indenture of charter party began at once, “This indenture witnesseth that Bentley, master and part owner of the ship A., with the consent of Cooker, the other part owner, lets the ship to Child for a voyage,” and Child then covenanted to pay Bentley so much as master, and also with Cooker, to pay to him 800*l.*, and an action having been brought by Cooker for the 800*l.*, Child pleaded that only himself and Bentley were the parties to, and sealed and delivered the deed, the court held on demurrer, that the deed was not an indenture *inter partes*, in which “none that is not party to the deed can have an action upon it;” but that the instrument was in the nature of a deed poll, whereby those named in, and who sealed the deed, might covenant with other persons strangers to the deed to do several acts for which every one severally might bring his action. (i) As in the case of an ordinary bond or obligation where “fifty persons may be bound to one who is no party to the instrument, and all are liable to an action at his suit.”

The portion of the transfer of property act, which continued in force from the 1st of January to the 1st of October, 1845, enacts, that any person not being a party to any deed may take an immediate benefit under it *in the same manner as he might under a DEED POLL*,” and the 8 and 9 Vict., c. 106, enacts, that after the 1st of October, 1845, an immediate estate or interest, and the benefit of a condition or covenant respecting any tenements or hereditaments may be taken, although the taker thereof be not named a party to the same indenture.

(g) *Scudamore v. Vandenstene*, 2 Inst. 673;
2 Rolle Ab. Fairs, F. 1, Cas. Eliz. 56, s. c. *Storer*
v. Gordon, 8 M. & S. 322.

(h) Roll Abr. Fairs, 22. *Scudamore v. Van-*

denstene, 2 Inst. 673.

(i) *Cooker v. Child*, 2 Lev. 74. *Shaw v.*
Sherwood, 1 Cr. 729; Yelv. 23.

When there is no formal commencement to a deed describing who are the parties to it, and whose deed it is, it is held to be the deed of those who are named in the instrument as contracting parties, and who put their seals to it. Thus, where no parties were mentioned in the commencement of the deed, but the instrument began simply, "It is agreed that," &c., and ended "In witness whereof *we* have set *our* hands and seals," and the plaintiff and defendant were both named in the deed, and had both signed and sealed the deed; it was held, that the signing and sealing made them parties to the instrument. (*k*) But they must, of course, be named in the body of the deed, for no person can maintain an action upon a contract under seal, unless he is named therein, (*l*) either by his own name or by some acquired and well-known title or description, and the contract or covenant must in express terms be made with him.

Of the right of action upon DEEDS in the case of TRUSTEE and CESTUI-QUE TRUST.—It is a fixed rule of law, for example, that the action upon a contract under seal, whether such contract be a deed *inter partes* or a deed poll, must be brought by the party with whom the contract is in terms made, and not by the person in whose behalf or for whose benefit it has been made.

If, for example, a man by deed covenants or promises to pay a sum of money to A., to the use of B., or, for the benefit of B., B. cannot maintain an action upon the instrument. (*m*) Neither, if a covenant be made to three persons to pay money to them to the use of a fourth, can the fourth person sue upon the deed. (*n*) The courts of law recognise no other interest but that of the party with whom the contract is expressed to be made, and they give consequently no legal force or effect whatever, by way of contract, to the words "to the use" or "for the benefit." Thus, if a bond or obligation under seal be expressed to be made to A., for the payment of 20*l.* a piece to B. and C., neither of them can sue for the money, but the action must be brought in the name of A. (*o*) And if a covenant or bond be made to two or more persons to pay money to one of them, the action must be brought by all, and he to whom the money is to be paid cannot alone sue for it. (*p*) In these cases the party to whose use or for whose benefit the contract has been entered into, has a remedy in equity against the person with whom it is expressed to be made. The

(*k*) *Nurse v. Framton*, 1 Raym. 28; 1 Salk. 214, s. c.

(*l*) *Green v. Horn*, 1 Salk. 197; Comb. 219, s. c.

(*m*) *Offley v. Ward*, 1 Lev. 235; 3 Lev. p. 140, s. c.

(*n*) *Petrie v. Bury*, 3 B. & C. 353; 5 D. & R. 152. *Barford v. Stuckey*, 2 B. & B. 333.

(*o*) *Shaw v. Sherwood*, 1 Cro. 729; Yelv. 22, s. c.; 3 Lev. 140.

(*p*) *Anderson v. Martindale*, 1 East, 497 501. *Rolls v. Tate*, Yelv. 187

Court of Chancery deems the latter a trustee for the former, and will compel him to execute his trust, according to the apparent intention of the contracting parties. Hence, the one is technically said to have the legal estate in the contract, and the other the equitable interest. (*q*) When, however, no express promise or engagement is entered into with some person or persons in particular, the case is different. If, for example, a man by writing sealed and delivered, acknowledges generally that he has received a particular sum of money to the use of A., this makes him a debtor to A. to the amount specified. (*r*)

A bill or receipt under seal was couched in the following terms: "Received of A. 40*l.* to the use of B. and C. equally, to be divided between them, to be repaid at such time as shall be most to the profit of B. and C.;" and it was held, that this was an engagement with B. and C. to pay the money to them whenever they required it, and that B. and C. might consequently maintain an action for the recovery of the 40*l.* (*s*) When, however, the right of action is vested in one person, on behalf of and for the benefit of another, the law will, in certain cases and under certain circumstances, permit the party beneficially interested, on tendering an indemnity, to maintain an action in the name of the party with whom the contract is in terms made. (*t*)

Of the right of action of COVENANTEES who have omitted to execute the DEED.—It is not in general necessary that those who have been made parties to a deed *inter partes* should execute the deed, to be enabled to sue thereon.

Thus, where two joint covenantees sued upon an indenture to which they were both parties, but which was executed by one of them only, it was held, that the action was maintainable on the ground that the plaintiff who had not executed was a party to the deed, and that the covenantor had executed to him as well as to his co-plaintiff. (*u*) Neither need a grantee under a deed execute, provided he has been made a party to the deed, for the law presumes his assent to the grant in the absence of an express disclaimer. (*x*) Where real property, therefore, is conveyed to trustees, parties to a deed, it is not necessary for them to execute, as the legal estate forthwith vests in them, unless they disclaim the grant; and if

(*q*) *Schack v. Anthony*, 1 M. & S. p. 575.
Scholey v. Mearns, 7 East, 153.

(*r*) *Montagu* 28 H. 8. *Core v. Woody*,
Dyer, 20, 21. *Whorewood v. Shaw*, Yelv. 23.

(*s*) *Shaw v. Sherwood*, 1 Cr. 729.

(*t*) *Lamb v. Vice*, 6 M. & W. 472; Chitt.
Arch. 996. *Scholey v. Mearns*, 7 East, 148.
Hanson v. Parker, 1 Wils. 257. *Gibson v.*

Winter, 5 B. & Ad. 96; post. ch. 11.

(*u*) *Clement v. Henley*, 2 Rolle Abr. 22;
Faits F. 2. *Parke, J., Rose v. Poulton*, 2 B. &
Ad. 830.

(*x*) *Townson v. Tickell*, 3 B. & Ald. 31, and
the disclaimer of a grant of realty should be made
by deed. T. 13, R. 2. Fitz. Abr. Joint-tenancy,
pl. 9.

one of the trustees renounces, the whole property vests in those who accept the trust. (y) When, however, the execution of the deed by one of the parties is necessary to create or transfer some estate or interest, the creation or transfer of which forms the foundation or consideration for the covenants and stipulations contained in the deed, the party neglecting to execute cannot maintain an action upon the covenants; as in the case of an indenture of lease, where the covenants are entered into by the lessee with the lessor in contemplation and in consideration of a lease, if the lessor neglects to execute the instrument, so that no lease is actually granted, he cannot maintain an action upon the covenants, (z) unless the contract has been carried into effect by the actual entry of the lessee upon the lands, or the covenantor has had the full benefit of the thing intended to be done. (a)

SECTION II.

OF THE PLAINTIFFS IN ACTIONS UPON SIMPLE CONTRACTS.

The right of action upon simple contracts not confined to the parties to such contracts.—The ancient rule of the common law, which, in the case of contracts under seal, *inter partes*, provides that a person who has not been made a party to the contract shall not maintain an action upon it, does not extend to SIMPLE CONTRACTS *in inter partes*. Thus, where tutors dative, appointed by a Scottish court guardians of an infant heir, entered into an agreement for a lease, which was described to be made between the tutors dative of the one part, and the defendant of the other, whereby a salmon fishery, belonging to the infant, was demised by the tutors dative to the defendant for four years at a certain rent, which the defendant promised to pay to the infant, it was held, that the infant might maintain an action in his own name upon the agreement, to recover arrears of rent, although he was no party to the contract. (b)

Neither is the right of action upon simple contracts confined, as in deeds, to the person with whom the contract is in terms made, but the person for whose use or for whose benefit a simple contract has been

(y) *Small v. Marwood*, 9 B. & C. 300.

(z) *Soprani v. Skurro*, 1 Danv. 74, p. 3.;
Yelv. 18, Com. dig. Cov. F. *Ross v. Poulton*,
2 B. & Ad. 831. *Cardwell v. Lucas*, 2 M. & W.
111; ante, p. 185.

(a) *Pistor v. Cater*, 9 M. & W. 315; ante,
ch. 6, p. 185.

(b) *Carnegie v. Waugh*, 2 D. & R. 277. *Fitzmaurice v. Waugh*, 3 D. & R. 273. *Sutherland v. Pratt*, 13 Law J., N. S., (Exch.) 246.

entered into, may maintain an action thereon, although he is no party to it, and although the contract is not, in express terms, made with him, but with another in his behalf. (b) But it is said, that "a STRANGER TO THE CONSIDERATION upon which a simple contract is founded cannot maintain an action upon the contract."

If the act or service, for example, forming the cause or consideration for the promise to the plaintiff be done or performed by some third party, and not by the plaintiff himself, nor at his instance and by his procurement, the plaintiff is said to be a stranger to the consideration, and he cannot maintain an action upon the contract. Thus, where one Price, being indebted to the plaintiff in the sum of 18*l.*, agreed to work for the defendant at certain wages, and leave the amount earned by him in the defendant's hands, and the defendant, in consideration thereof, promised to pay to the plaintiff Price's debt to the plaintiff, and the work having been performed, the plaintiff brought an action against the defendant for the non-payment of the money, and obtained a verdict for the amount, judgment was arrested on the ground that he was a stranger to the consideration. (c)

Very slight circumstances are, however, sufficient to connect the consideration with the promise, so as to enable the promisee to maintain an action thereon. If the act or service, for example, forming the consideration for the defendant's promise to the plaintiff has been rendered to the defendant, at the instance and request, and through the instrumentality and procurement of the plaintiff, it has been held that the consideration moves from the plaintiff so as to enable him to maintain an action upon the promise. (d)

A parishioner having been excommunicated, on the prosecution of the churchwardens, for non-payment of a church rate, promised the churchwardens to pay them a certain sum in consideration of an absolution from the sentence of excommunication, to be granted him by the bishop, and it was held, in an action brought by the churchwardens for a breach of the promise, that the circumstance of the absolution having been granted by the bishop at the instance and request of the churchwardens, and by reason of the promise to pay them the money, was an answer to the objection that the consideration did not move from them, but from the bishop. (e)

(b) *Sharpe's case*, Latch. 272, Poph. 81; 3 Cro. 77. *Howard v. Approbart*, Litt. 85. *Holt, J., Yard v. Eland*, 1 Baym. 368; 1 Salk. 116, a. c. *Evans v. Mariett*, 1 Baym. 271.

(c) *Price v. Easton*, 4 B. & Ad. 434. 1 N. & M. 303, a. c. *Crow v. Rogers*, 1 Str. 592. *Bourne v. Mason*, 1 Ventr. 6; 2 Keb. 457, a. c. *Taylor v. Watson*, 4 M. & B. 259. *Tomlinson*

v. Gell, 6 Ad. & B. 564; 1 N. & P. 588, a. c.

(d) *Sadler v. Payne*, Sav. 23, 24. *Hunt v. Bate*, Dyer, 272 a. *Lampleigh v. Braithwaite*, 1 Smith, 67; Hob. 105. *Townsend v. Hunt*, Cro. Car. 408. *Denman, C. J., Eastwood v. Kenyon*, 11 Ad. & B. 452.

(e) *Curtis v. Collingwood*, 1 Ventr. 297; 2 Lev. 119, a. c.; 3 Keb. 435.

The consideration may be said, indeed, to draw after it the promise, so that the promise, to whomsoever in fact made, shall follow the consideration, and be deemed, in construction and contemplation of law, to be made to the party from whom the consideration moves. (f)

The defendant in an action of assumpsit had promised the father of the plaintiff, that if the plaintiff would marry the defendant's daughter, he, the defendant, would pay to the plaintiff the sum of 20*l.* The marriage was celebrated, and the plaintiff brought his action to recover the 20*l.*, when it was objected that the promise was not made to him, but to *his father*, but the court held that the action was properly brought by the son, who had performed the meritorious act forming the consideration for the promise, and was to have the benefit of the promise. (g)

An action was brought upon a guarantee which had been given by the defendant to the plaintiff, and was to the following effect:—"To Mr. John Garrett; Sir, I understand from Mr. Gibbons that you had the goodness to consent to advance 550*l.* &c. upon my assurance, which I hereby give, that provision shall be made for repaying you this sum, &c." At the trial it appeared, that the plaintiff was a partner with two other persons in a banking house, and that *the firm* had advanced the money, whereupon the court said to the plaintiff, "You did not make the advance, and cannot maintain the action." And then another action was brought upon the guarantee, in the name of the firm, when it was holden that they were the proper parties to sue upon the contract, as the consideration moved from them, although the promise was made to the one partner only. (h)

If there is A BENEFIT *to the defendant*, and a LOSS *to the plaintiff*, consequential upon, and directly resulting from, the defendant's promise in behalf of the plaintiff, there is a sufficient CAUSE OR CONSIDERATION *moving from the plaintiff* to enable the latter to maintain an action upon the promise to recover compensation. (i)

Sir Edward Poole was about to cut down 1,000*l.* worth of timber growing on his estate, for the purpose of portioning his daughter Grisel, when the eldest son and heir promised Sir Edward, that if he would forbear to fell the timber, he, the son, would pay his sister Grisel 1,000*l.* Sir Edward, confiding in his son's promise, allowed the timber to stand, and after his death, the land with the timber growing thereon, descended to the son, who then refused to fulfil his promise. The daughter and her husband

(f) *Martyn v. Hind*, Cowp. 437; Doug. 142, s. c. *Sadler v. Payne*, Sav. 23, 24; and see post, ch. 9, sec. 2.

(g) *Provender v. Wood*, Het. 30.

(h) *Garrett v. Handley*, 3 B. & C. 462; 5 D. & B. 319; 4 B. & C. 664; 7 D. & B. 144, s. c.

(i) Cowp. 294. Best, C. J., *Morley v. Boothby*, 3 Bing. 113; 10 Moore, 395, s. c.

brought an action against him, and obtained a verdict, when it was objected, in arrest of judgment, that the promise was made to Sir Edward, the father, and not to the daughter, that the consideration did not arise from the latter, and that the action ought to have been brought by the executor of the deceased Sir Edward; but judgment was given for the plaintiffs, for the son had the *benefit* of having the timber, and the daughter had *lost* her portion by reason of the brother's promise. (k)

Rookwood having issue three sons, was about to charge his lands with 40*l.* per annum to each of his youngest sons for their lives; but the eldest son desired him not to charge the land, and promised to pay the younger sons duly the 40*l.*, and Rookwood, confiding in this promise, neglected to make the provision he had intended for his younger children out of the land. After his death, the eldest son refused to fulfil his promise, and the two younger sons brought an action for the recovery of the money, and "the whole court held clearly" that the action was well brought, and that it was a good consideration, for the defendant's land would have been *charged with the rents* but for his promise to pay the money to the plaintiffs. (l)

It has been held, also, that the near relationship of parent and child extends to the child an interest in a consideration and contract entered into by the parent in its behalf and for its benefit, that the parent may be considered as the mere agent of the child in whose behalf and for whose benefit the contract is made, and that the latter may, consequently, maintain an action upon it. "There is," saith Scroggs, C. J., "such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, and such a nearness of relationship between them, that the consideration and promise to the father may well extend to the children." (m) If a man should say, "Give me a horse, and I will give your son 10*l.*, the son may bring the action, because the gift was upon consideration of a profit to the son." Thus, where the defendant promised the father, that if the father would surrender a copyhold to the defendant, the defendant would pay the daughter 20*l.*, and the daughter brought her action upon this promise, it was held maintainable, and that she was entitled to recover the money (n) So, where the defendant promised a physician, that if he succeeded in effecting a particular cure, he, the

(k) *Dutton v. Poole*, 2 Lev. 210; 1 Vent. 318, 334; T. Jones, 102; affirmed in error in the Exchequer Chamber, T. Raym. 302. "It is difficult to conceive," said Lord Mansfield, "how a doubt could be entertained in the case of *Dutton v. Poole*." Doug. 145; Cowp. 443.

(l) *Rookwood's case*, 1 Croke, 164.

(m) 2 Lev. p. 211. "Where a promise is made to the father, for the benefit of the son, the son may bring the action." Hardr. 321.

(n) *Thomas v. —*, Styles, 461.

defendant, would give a certain sum of money to the physician's daughter, and the daughter brought the action, it was adjudged maintainable, "*for the nearness of the relation* gives the daughter the benefit of the consideration performed by the father." (o)

The plaintiff in his declaration alleged that an agreement had been entered into between him and the defendant for the marriage of the plaintiff's son with Constance, the defendant's kinswoman, and that the defendant, in consideration that the plaintiff would settle an estate upon the said Constance, for her jointure, promised the plaintiff to give the plaintiff's son 200*l.*, in marriage with the said Constance, and then averred that the marriage had been celebrated, and that the plaintiff had assured the lands, and that the defendant had neglected to pay the 200*l.* After a verdict for the plaintiff, it was moved in arrest of judgment that the action ought not to have been brought by the father, but by the son, for whose benefit the contract had been entered into, and who was to have the advantage thereof; and of this opinion was the court, and judgment was given for the defendant. (p) A contrary doctrine, however, was laid down in *Pine v. Norris*; (q) but that decision has met with disapproval, and has been overruled. (r) In another case it was held that either the parent or the child might maintain the action. The plaintiff there sued as the administratrix of the promisee who died intestate, and declared that upon an intended marriage between the intestate's daughter and the defendant's son, it was agreed that the intestate should give a portion of 50*l.* with his daughter to the defendant's son, and that if the daughter survived the son, the defendant should pay her 100*l.* after his death, and the declaration then alleged mutual promises between the intestate and the defendant to perform the agreement, and went on to show that the marriage was solemnized, and that the intestate paid 50*l.*, and died, and that then the son died, and assigned, as a breach of the defendant's promise, the non-payment of the 100*l.* After verdict for the plaintiff, it was moved in arrest of judgment that the action should have been brought by the daughter; but judgment was given for the plaintiff for the consideration moved from the intestate, and the promise was made to him, yet it was agreed that the action might have been brought by the daughter. (s) The more correct principle would appear to be that the action should be brought by the party who has sustained the damage by reason of the

(o) Cited in *Bourne v. Mason*, 1 Ventr. 6.

(p) *Levet v. Hawes*, Cro. Eliz. 619, 652; Het. 176, s. c. *Rainer v. Mortimer*, Brownl. 40.

(q) Cited 2 Lev. 211.

(r) *Dutton v. Poole*, Jones T. 108; T. Raym. 303; 2 Lev. 212.

(s) *Bayfield v. Collard*, Aleyn. 1. *Bell v. Chaplain*, Hardres, 321.

non-performance of the contract; for if, as it was held in the last case, the damages when recovered would be assets in the hand of the administratrix to be administered, the daughter, in whose behalf and for whose advancement the contract was entered into, and who sustained the damage by reason of its non-performance, might be deprived of all the benefit she was intended to take under it, as the recovery of the administratrix would of course bar her right of action in respect thereof.

The person who has sustained the injury is the party justly entitled to look for compensation.

In an action of assumpsit, the plaintiff in his declaration alleged that the defendant's son having assaulted the plaintiff, the plaintiff went to a justice of the peace to make a complaint, and procure a warrant to bind over the defendant's son to keep the peace, that the defendant, in consideration that the plaintiff would desist from his complaint, promised the plaintiff that the defendant's son should keep the peace against the plaintiff, and also against the plaintiff's son, and the declaration then alleged that the plaintiff, confiding in the defendant's promise, desisted from his complaint, notwithstanding which the defendant's son afterwards assaulted the plaintiff's son. After verdict for the plaintiff, it was alleged in arrest of judgment that the father had not sustained the slightest damage by the battery of the son, and that the action did not lie for him, and of this opinion was the court; and they accordingly gave judgment for the defendant. (t) Afterwards the son brought an action upon the promise so made to his father, and "all the court resolved" that the action was well brought. (u)

The uncle and guardian of an infant delivered 12*l.* to J. S. to educate the infant, and in consideration of this J. S. promised to educate the infant, and to pay to the infant 12*l.* when he came of age; and it was held that the latter was the proper party to maintain an action for the non-payment of the 12*l.* (x)

In these cases the promise, though in fact made to a third party, is in point of law made to the plaintiff himself, and should be declared upon according to its legal effect, as a direct promise to him, as in the case of promises, made to the wife or to the agent, which are declared upon as direct promises to the husband or the principal. (y) "If a promise," says Eyre, C. J., "be made to a A. for the benefit of B., and an action

(t) *Rippon v. Norton*, 1 Cro. 849.

(u) *WALTER Rippon v. Norton*, 1 Cro. 881; *Yelv.* 1, s. c.

(x) *Odham v. Bateman*, *Bolle Abr.* 1, 31, Z.

pl. 8; *Style*, 313; *Stile*, 269.

(y) *Tatam's case*, cited in *Bafield v. Col-lard*, *Aleyn*, 1. *Ankerstein v. Clarke*, 4 T. R. 616. *Arnold v. Revault*, 4 Moore, 66.

be brought by B., the promise must be laid as having been made to B., and the promise actually made to A. must be given in evidence to support the declaration." (z)

Bankers and depositaries of money.—In all actions for money had and received, very slight circumstances will satisfy the doctrine that the consideration upon which the contract or promise is founded, must move from the plaintiff. If money is sent to a banker for the payment of certain debts, the consideration for a promise by the banker to pay over the money, pursuant to the directions he has received, is said to move from the creditor, whose particular debt is to be paid, and who is the object of the remittance; that the debtor may be considered the agent of creditor, and the money paid indirectly to the banker by the latter.

In an action for money had and received, it appeared that Wood, being indebted to the plaintiff, remitted to the defendant 100*l.* to pay to the plaintiff, and the defendant afterwards promised the plaintiff to pay him the 100*l.* After verdict for the plaintiff, an application was made for a new trial, on the ground that there was no consideration moving from the plaintiff to support the defendant's promise to pay him the money; but it was held that the consideration did move indirectly from the plaintiff, and consequently that he was entitled to maintain his action. (a) But in all cases where money is sent to one person to be paid by him to another, to enable the person who is the object of the remittance to maintain an action against the remittee, to recover the amount transmitted to him, there must be an express promise or assent on the part of the latter to pay over the money to the former or hold it to his use, inasmuch as the mandate is revocable, so long as no such assent, promise, or engagement, has been given or entered into. (b) When, however, the assent has been given, and the attornment made, the order to pay the money, if founded upon a precedent debt or other good consideration, becomes irrevocable, (c) the creditor looks no longer to the security of his original debtor, but relies on the assent of the remittee, which cannot be retracted, and is entitled, as we have seen, to main-

(z) *Feltnaker's Company v. Davis*, 1 B. & P. 102. "In *Legal's* case, however, the plaintiff declared upon a promise made to the plaintiff's attorney on behalf of the plaintiff," and not on a direct promise to the plaintiff himself; and the court held that it was good "either one way or the other." *Latch*, 206; see also *Bell v. Chaplain*, Hardr. 321.

(a) *Lilly v. Hays*, 1 N. & P. 26; 5 Ad. & E. 548, s. c.

(b) *Williams v. Everett*, 14 East, 596. *Fisher v. Miller*, 7 Moore, 537. *Baron v. Husband*, 4 B. & Ad. 611. *Howell v. Bant*, 5

B. & Ad. 504; 2 N. & M. 381, s. c. *Stewart v. Fry*, 7 Taunt. 339. *Wedlake v. Hurley*, 1 C. & J. 83. *Lloyd v. Wilson*, 330, s. c. *Grant v. Austen*, 3 Price, 58. *Yates v. Bell*, 3 B. & A. 648. *Gilbert v. Ruddeard*, 3 Dyer, 272 a., n. 82. *Hodgson v. Anderson*, 3 B. & C. 842; 5 D. & R. 744, s. c. *Disborne v. Denabie*, 1 Rolle Abr., p. 30, 31, Z. pl. 5.

(c) *Winter v. Foweraker*, 2 Roll. Rep. 39, 40. *Robertson v. Fauntleroy*, 8 Moore, 10. *Atkin v. Barwick*, 1 Str. 165. *Walker v. Rostron*, 9 M. & W. 411.

tain an action against him for the amount received. "Where money is paid by A. into the hands of B., to remain at the disposal of C., the right to that money continues in A. until B. *gives* and C. takes credit for it, or B. actually pays it to C.; up to this period B. is the agent of A. only; and A. may countermand the authority to make the payment in the same manner as a person who sends another to pay money, may stop him before he arrives at the place where it is to be paid, and require him to deliver it back." (d) And if the amount transmitted be a mere voluntary gift or donation, founded upon no precedent consideration, debt, or duty, the authority may be revoked at any time before the money is actually paid over by the remittee, (e) just as money when paid by mistake to an agent, and placed by him to the account of his principal, but not paid over, may be recovered back by the party who has inadvertently transmitted it. (f) Subject to these qualifications, some of the old cases in Rolle's Abridgment, where it has been holden that if 20*l.* be delivered to B. to pay over to C., C. can maintain an action against B. to recover this money, or that when goods are given by A. to B., under an agreement that B. shall pay 20*l.* to C., that becomes a debt due to C., may still be considered good law. (g)

Warehousemen, wharfingers, and bailees of goods, stand in the same situation as bankers and depositaries of money, and when they have accepted a delivery order, presented to them by a purchaser, they become, as we have before seen, (h) the bailees of the party mentioned in such order, and are liable to him upon their promise to hold the goods on his account and at his disposal. "If the intention of the parties to pass the property, whether absolute or special in certain ascertained chattels is established, and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier or shipmaster, employed by the consignor or a third person, and the chattels are so placed on account of the person who is to have that property, and the depositary assents; it is enough: and it matters not by what documents this is effected." (i)

Carriers.—The action against a carrier for the loss of goods entrusted to him for conveyance should, in the absence of an express contract for

(d) Best, C. J., *Gibson v. Minst*, 9 Moore, 36. *Turberville v. Porter*, Dyer, 49 a., n. (10.) *Wheatly v. Low*, Cro. Jac. 668.

(e) *Lyte v. Pany*, Dyer, 49 a., b. p. 7. *Taylor v. Lendey*, 9 East, 54.

(f) *Buller v. Harrison*, Cowp. 565. *Cox v. Prentice*, 3 M. & S. 344. *Peto v. Blades*, 5

Taunt. 657. *Edwards v. Hodding*, id. 815.

(g) *Starkie v. Mylne*, 1 R. Abr. p. 82, pl. 13. *Disborne v. Denabie*, ib. p. 30, 31, *l.*, pl. 5.

(h) Ante, p. 64—66.

(i) *Parke, B., Bryans v. Nix*, 4 M. & W. 791.

the carriage of them, be brought by the owner of the goods, for with him, as the party damnified, is the implied contract for their safe conveyance deemed to be made. (*k*) When goods are delivered to a carrier in execution of a contract of sale, for the purpose of transmission to an intended purchaser, and no express contract, founded upon a pecuniary consideration, moving from the consignor, has been entered into between the carrier and the consignor for the carriage of them, the law raises an implied promise for their safe conveyance in favour of the party in whom the right of property in the goods is at the time vested. If the right of property and the risk of loss have by the previous contract of purchase and sale passed to the consignee, (*l*) the latter is of course the only party entitled to sue the carrier for an injury to the goods, whether such carrier be a carrier by land, or a carrier by water, and whether he be named by the purchaser or chosen by the vendor. (*m*)

If, on the other hand, from fraud or non-compliance with the requisites of the Statute of Frauds, no actual sale has taken place, so as to transfer the right of property and the risk of loss from the consignor to the consignee, the consignor is, of course, the proper party to maintain the action. Thus, where the consignor had delivered goods to a carrier in obedience to a fictitious order, which professed to come from a well-known tradesman of respectability, but had in reality been sent by a swindler, it was held, that as no *bonâ fide* sale had taken place, the consignor had not been divested of his property in the goods, and that he was therefore the proper party to sue the carrier for a neglect of duty in delivering them to the swindler, who applied for them at the carrier's office, instead of delivering them at the residence of the tradesman to whom they were addressed. (*n*) So, if a tradesman merely sends goods for approval to a particular customer, or on terms of "sale or return," or sends goods of the value of 10*l.* and upwards, pursuant to an oral order or an oral contract of sale, to a person who has not given "earnest" or made a part payment, or accepted any part of the goods, and the contract is void by reason of non-compliance with the provisions of the Statute of Frauds, then, as there has been no actual sale, so as to transfer the right of pro-

(*k*) *Sargent v. Morris*, 3 B. & Ald. 277. *Brandt v. Bowlby*, 2 B. & Ad. 938.

(*l*) *Richardson v. Dunn*, 2 Ad. & E. N. S. 224; 1 G. & D. 417. Ante, ch. 3.

(*m*) *Vale v. Bale*, 1 Cowp. 294. *Coxe v. Harden*, 4 East, 217. *Daves v. Peck*, 3 Esp. 12; 8 T. R., 382, s. c. *Dutton v. Solomonson*, 3

B. & P. 584. *Brown v. Hodgson*, 2 Campb. 35. *King v. Meredith*, ib. 369. *Fragano v. Long*, 4 B. & C. 219.

(*n*) *Duff v. Budd*, 6 Moore, 469; see also *Stephenson v. Hart*, 1 M. & P. 357; 4 Bing. 476, s. c.

party and the risk of loss to the consignee, the consignor is the party to sue the carrier. (o)

But when a special contract has been entered into between the carrier and the consignor, whereby the carrier, in consideration of a sum of money paid or agreed to be paid by the consignor, as the price of the carriage of goods, agrees with him to convey them to the consignee, it is no answer to an action, brought by the consignor against the carrier, upon such special contract, to say that he is not the owner of the goods. In such a case the action may be brought either by the consignor with whom the express engagement was made, or by the consignee as the owner of the goods in whose behalf it was made. (p) Thus, where the plaintiff, the consignor, having received goods from Amsterdam, to be transmitted to the consignee in Surinam, shipped them on board the defendant's vessel upon a bill of lading which stated that the goods were shipped by the plaintiff, that they were to be delivered in Surinam to the consignee or his assigns, and that the freight was paid by the plaintiff in London; it was held by Lord Ellenborough, that the defendant, after having signed such a bill of lading, could not bring the ownership of the goods into question. The consideration upon which the contract was founded moved from the plaintiff: the undertaking was made to him, and he was therefore entitled to maintain the action to recover the value of the goods, and would hold the sum recovered, as a trustee for the real owner. (q) So, where a laundress residing at Hammersmith was in the habit of employing a carrier to convey linen from Hammersmith to the residence of the consignee at London, and the carrier was paid by the laundress; it was held, that the latter was entitled to maintain an action upon the special contract against the carrier for the loss of the goods by the way, although they belonged to the consignee. (r) In these cases the bailee of goods who has a special property in them may enforce the express contract entered into with the carrier unless his principal interferes to prevent him. "The rule is, that either the bailor or the bailee may sue, and whichever first obtains damages it is a full satisfaction." (s)

(o) *Swain v. Shepherd*, 1 M. & Rob. 224. *Snee v. Prescott*, 1 Atk. 248. *Coates v. Chaplin*, 3 Ad. & E. N. S. 489. *Stockdale v. Dunlop*, 6 M. & W. 224.

(p) *Davis v. James*, 5 Burr. 2680. *Bell v. Chaplain*, Hardres, 321. *Moore v. Wilson*, 1 T. R. 659. *Dunlop v. Lambert*, 6 Cl. & Fin. 620, 627. In *King v. Meredith*, 2 Campb. 639, Lawrence, J., held that the mere circumstance that the carriage was to be paid by the consignor, was not of itself sufficient to give the latter a right of action against the carrier. If,

indeed, the consignor, acting in a representative character, as the known agent of the consignee, should agree to pay the price of the carriage, then the contract would be deemed to be made with the principal and owner of the goods, and not with the mere agent. *Sargent v. Morris*, 3 B. & Ald. 277.

(q) *Joseph v. Knox*, 3 Campb. 320.

(r) *Freeman v. Birch*, 1 N. & M. 420.

(s) *Parke, B., Nicolls v. Bastard*, 2 C. M. & R. 660.

If, after the carrier has fulfilled his part of the contract by conveying the goods to the place to which they are directed, it should appear that there is no such person as the one to whom the goods are addressed, then an entirely new contract arises by implication of law between the carrier and the consignor; the carrier holds the goods as the bailee of the consignor, and is bound to take due and ordinary care of them and to deliver them to the consignor, on being paid his fair and reasonable charges. (s)

(s) *Stephenson v. Hart*, 1 M. & P. 375.

CHAPTER IX.

OF THE RIGHT OF ACTION EX CONTRACTU IN THE CASE OF PRINCIPAL AND AGENT.

SECTION I.—Deeds—The principal's right of action upon deeds entered into and executed by an agent—The principal may become a party to a deed through the medium of an agent—But the contract must be made with the principal, and not with the agent on his behalf—When the agent's authority must be under seal—Of the agent's right of action upon deeds entered into and executed by him in a representative character on behalf of a named principal—He must sue as a trustee for the principal.

SECTION II.—Simple contracts—The principal's right of action upon simple contracts—The principal the proper party to sue upon all simple contracts entered into by an agent as such—His right of action when the agent has concealed his representative character—When the principal may maintain an action to recover back money paid away or lent by an agent.

SECTION III.—Simple contracts—The agent's rights of action upon bills of exchange and promissory notes, also upon simple contracts where his representative character has been concealed, or where he has some interest or a special property in the subject matter of the contract—Brokers who have advanced money on goods consigned to them for sale—Factors—Auctioneers—Policy-Brokers—Bailees of goods—The agent's right of action upon contracts which have been repudiated by the principal, or where the agent himself is the real principal.

SECTION I.

OF THE RIGHT OF ACTION OF THE PRINCIPAL AND AGENT UPON DEEDS.

WE have already seen that by the common law a person who was not made a party to a deed *inter partes* could not maintain an action upon the contract. A man might, however, become a party to a deed, and acquire a right of action upon the instrument through the medium of an agent as

well as by his own immediate act. By an authority in writing under seal one man might authorize another to enter into, and to execute, contracts under seal in his behalf, (a) but it depended upon the express terms of such contracts and upon the mode in which the power given to the agent was exercised, whether the contract when made was the contract of the principal or of the agent, or whether it was the contract of neither the one nor the other, and consequently entirely void.

Thus, where an action of covenant was brought by the principal upon a deed expressed to be made by the agent "for and on behalf" of the principal of the one part, and the defendant of the other part, and the covenants were all expressed to be made to and with the principal, the name of the agent never occurring in the deed after the commencement, where he was described as a party to the contract, until the conclusion, where the deed appeared to be executed in his name; it was held, that the principal not having been made a party to the deed, could not maintain an action upon the covenants contained within it. (b) Neither could the agent himself have sued upon the deed, for the covenants not having been entered into with him, he could have no right of action upon them. Now, however, the action may be maintained by the principal, when the covenant has been entered into with him, and the deed has been executed on or after the first day of January, 1845; for by the act of 7 & 8 Vict. c. 76, § 6, it is enacted, as previously mentioned, that "any person not being a party to any deed may take an immediate benefit under it in the same manner as he might under a deed poll." (c)

And with regard to deeds entered into and executed prior to the 1st of January, 1845, if the principal has by a written authority sealed and delivered, authorized the agent to enter into and execute the deed, and the covenants contained in such deed are entered into with the principal in express terms, and the agent merely executes the deed in the name of the principal, (d) then the contract is the contract of the principal, and he alone can maintain an action upon it. If, on the other hand, the agent is made a party to the deed, on behalf of the principal, and the covenants are entered into with the agent as such, then the contract is the contract of the agent, and the latter must bring the action as a trustee for the principal, for the person with whom a contract under seal is in express terms

(a) Com. Dig. C. 1, C. 5, *Horsley v. Rush*, cited 7 T. R. 209.

(b) *Berkeley v. Hardy*, 8 D. & R. 102; 5 B. & C. 355, s. c.

(c) Ante, ch. 8, s. 1.

(d) An agent who has an authority under

seal to grant leases, should merely execute the lease in the name of the principal. If he demises in his own name, the lease is void, as he has himself no estate in the land. *Frontin v. Small*, 2 Raym. 1418; 2 Str. 705. *Combe's case*, 9 Co. 76, b; *Moore*, 70, pl. 91.

made, and not the person in whose behalf or for whose benefit it was made, is, as we have before seen, (e) the proper party to maintain an action upon the instrument.

SECTION II.

THE PRINCIPAL'S RIGHT OF ACTION UPON SIMPLE CONTRACTS.

Simple contracts entered into by the agent in his representative character.—We have already seen that the rule of law, which, in the case of DEEDS *inter partes* provides that "a person who has not been made a party to the contract shall not maintain an action upon it, does not extend to SIMPLE CONTRACTS *inter partes*, but that a person in whose behalf or for whose benefit a simple contract has been entered into may maintain an action thereon, although he is no party thereto, provided the consideration upon which such contract is founded moves from him. We have also seen (a) that the consideration draws after it the promise, so that the person from whom the consideration moves is the proper party to maintain an action upon the contract although the promise be not in express terms made to him, but to another in his behalf. In cases of principal and agent, therefore, the principal is, with a few exceptions presently noticed, the proper party to maintain an action upon all simple contracts entered into on his behalf and for his benefit by an agent.

If a person, on the face of a written document, appears to be an agent, contracting on behalf of a named principal, the contract is, in contemplation of law, made with the principal, from whom the consideration naturally moves, and who is the really contracting party, and not with the mere agent or instrument of communication, unless the latter has himself an interest in the contract. (b)

Certain tolls vested in a body of commissioners and their successors, were let by the commissioners to the defendant, who signed a memorandum in the following form: "I do hereby acknowledge to have hired the above tolls for three years by private contract, at 145*l.* per annum, to be paid to the treasurer of the commissioners at his house in Ely." In an

(e) Ante, ch. 9, s. 1.

(a) Ante, ch. 9, s. 2. Parke, B., *Beckham*

v. *Drake*, 9 M. & W. 95, 96.

(b) Post, p. 262—265.

action by the treasurer for the non-payment of the rent; it was held, that the contract was with the commissioners—to pay them through the medium of their officer, and that they alone could sustain an action upon it. (c)

Certain lands belonging to one David Jones, were let by auction under written conditions, which provided that the rent should “be paid into the hands of John Evans or James Thomas, auctioneers, or to their order.” At the end of the conditions, was the following memorandum, signed by David Jones: “Approved of the above conditions by me—David Jones.” The auctioneers brought an action for non-payment of the rent, against the person who hired the land upon these terms, and gave the written document in evidence in support of the action, but they were non-suited on the ground that the contract was not with the auctioneers but with David Jones, who was alone entitled to sue upon it.

Certain lands belonging to the corporation of Carmarthen were put up to sale by auction and the highest bidder, and the mayor signed the following agreement, which was attached to the conditions of sale: “The above mentioned premises, comprised in lot 35, were this day sold to David Bowen, for 1,000*l.*, subject to the conditions of sale within mentioned, and David Bowen, the purchaser or highest bidder of the said lot, and Thomas Morris, Esq., the mayor of the said corporation, on behalf of himself and the rest of the burgesses and commonalty of the borough of Carmarthen, do hereby mutually agree to perform and fulfil on each of their parts respectively the within conditions of sale.” The mayor brought an action against the purchaser for a breach of this agreement, but it was held, that the contract was between the purchaser and *the corporation*, and not between the buyer and “T. Morris, Esq.,” the mayor. (d)

And as regards simple contracts not reduced into writing, but resting merely on the verbal promises and engagements of the parties, or upon acts and deeds, from which a contract arises by implication of law, if the agent acts in a representative capacity on behalf of a named or known principal, the contract or promise which arises in respect of his dealings and transactions in such a character is not a contract with him, but with his principal, except in certain mercantile transactions presently noticed, where the agent himself has some special property or an interest in the subject matter of the contract. Thus, where the goods of the principal are sold by an apprentice or shopman in a shop, or his hay, corn, or cattle, or

(c) *Pigott v. Thompson*, 3 B. & P. 147.

(d) *Bowen v. Morris*, 2 Taunt. 374.

other produce of his farm, are sold by his bailiff, the contract is not with the mere servant, but with the master from whom the consideration moves. A mere steward or other agent employed to let or sell the land or realty of the principal, cannot himself maintain an action upon any contract which he may enter into in the course of such employment. Thus, where several persons rented a building to be used as a synagogue, and a treasurer was appointed annually by them, whose business it was to let seats and receive the rents for the use of the lessees; it was held, in an action brought by the treasurer for rent due in respect of the seats so let, that the contracts for the occupation of the seats, though in fact made with the treasurer, were, in point of law, made with the lessees who had the title to the synagogue, and that they, and not their servant the treasurer, were the proper parties to maintain the action. (e)

SIMPLE CONTRACTS by an agent who has concealed his representative character.—In all cases of simple contract, the contract of the agent is, in fact, the contract of the principal; and although the latter is unknown, and undisclosed, at the time that the contract is entered into, yet he may, at any subsequent period, so long as the contract remains executory, come forward and claim the benefit of it, but he is, of course, bound by all the equities raised by his agent whilst dealing apparently as a principal, and can take such rights of action only as the latter possesses at the time that he, the principal, discloses himself. (f) When the contract is in writing, and the agent appears on the face of it to be the contracting party, no mention whatever being made of the principal, it has been contended that the admission of parol evidence, to show that the party with whom the contract is so made is in reality only an agent, infringes the well-known rule of law, that the terms of a written contract cannot be varied, or contradicted, or added to, by oral testimony, inasmuch as it is offered to introduce a party to the contract other than the one in whose name it is expressed to be made. But it has been held, that the evidence amounts merely to an explanation of the real character of the transaction, and does not in any degree contradict or qualify the provisions and stipulations of the contract itself; and whilst "it is clear that parol evidence to vary a written contract cannot be received, yet that the parties contracted in the capacities of principals or agents may be explained." (g) "It is competent to show that one or both of the contracting parties were agents for other persons, and acted as such,

(e) *Israel v. Simmonds*, 2 Stark. 356. *Seignior and Wolmer's case*, Godb. 360.

(f) *Bastable v. Poole*, 1 C. M. & R. 410, s. c. *George v. Clagett*, 7 T. R. 359. *Carr v. Hinch-*

cliff, 4 B. & C. 547; 7 D. & R. 42.

(g) *Park, J.*, in *Wilson v. Hart*, 1 Moore, 50. *Sutherland v. Pratt*, 13 Law J., N. S., Exch. 246.

in making the contract, so as to give the benefit of the contract to the unnamed principal, and this whether the agreement be or be not expressed in writing." (A) The following cases may be adduced as examples of the admission of extrinsic evidence for the purpose of letting in a principal not named in the contract, and giving him a right of action thereon.

A letter to the following effect, signed by the defendant, having been addressed to the plaintiff's attorney: "Mr. Gwyn,—Sir, the bearer, David Williams, has a sum of money to receive from a client of mine, some day next week, and I trust *you* will give him indulgence till that day, when I undertake to see *you* paid;" and an action having been brought upon this undertaking against the defendant, oral evidence was admitted to show that Williams, being indebted to the plaintiff, the latter had employed Gwyn as his attorney to sue him, and that the letter had been addressed by the defendant to Gwyn as the attorney of the plaintiff, and not as a principal and creditor of Williams. (i)

An action was brought upon the following guarantee, addressed to the plaintiff by the defendant:—"Sir, I understand that *you* had the goodness to consent to advance 550*l.* &c. upon my assurance, which I hereby give, that provision shall be made for repaying *you* this sum, &c." At the trial it appeared, that the money had been advanced by a banking house in which the plaintiff was a partner, and it was held that the averment in the declaration that the plaintiff had advanced the money was not supported by the proof, (k) and that the action ought to have been brought in the names of the firm, although the guarantee had been given to the one partner alone. (l) But negotiable instruments, such as bills of exchange and promissory notes, form an exception to this rule. Upon such instruments, none but the parties mentioned by their name or firm can be admitted to sue. (m)

With regard to contracts not put into writing, it has been holden, that the principal may disclose his real character, and require the fulfilment of the contract with himself personally, even in the case of factors who have sold goods for the principal in their own names, under a *del credere* commission, (n) provided the general balance of accounts between the prin-

(A) Parke, B., *Higgins v. Senior*, 8 M. & W. 844. *Beckham v. Drake*, 9 M. & W. 91—96. *Ruppell v. Dempsey*, 4 N. & M. 81.

(i) *Bateman v. Phillips*, 15 East. 272.

(k) *Garrett v. Handley*, 3 B. & C. 462; 5 D. & R. 319, s. c.

(l) *Garrett and others v. Handley*, 4 B. & C. 664; 7 D. & R. 144, s. c. *Ruppell v. Roberts*, 4 N. & M. 81.

(m) *Beckham v. Drake*, 9 M. & W. 92, 96; 11 M. & W. 817, s. c. in error.

(n) An arrangement by which the factor for a higher commission than that usually paid, makes himself responsible to the principal for the due payment of the price of goods sold by him. *Grove v. Dubois*, 1 T. R. 115. *Johnstone v. Osborne*, 11 Ad. & E. 549. *Bonsi v. Stewart*, 5 Sa. N. R. 1.

principal and the factor is at the time in favour of the former. (o) Inasmuch, however, as the factor has a lien on the price of the goods in the hands of the buyer to the extent of the balance due to him from the principal on the general account, (p) his commission on the sale, monies advanced, &c., he may insist on payment from the buyer to himself in opposition to the principal, to the extent of the monies so due to him from the latter. (q)

Money paid by an agent.—If the money of the principal has been paid by the agent under circumstances which create a right to recover it back, the principal is the proper party to bring an action for “money had and received; (r) as in the case of a loan of money by a master, through the medium of his servant, apprentice, or clerk, or where the servant has been “cozened” or cheated out of his master’s money.

The Duke of Norfolk’s agent entered into a written agreement in his own name, and as it were on his own account, for the purchase of an estate, and paid a deposit of 300 guineas to the vendor; and it was held, on the non-completion of the purchase, through the default of the vendor, that the duke was entitled to maintain an action for the recovery of the deposit. (s) A Custom-house officer having demanded exorbitant fees from the master of a vessel, on his taking out a *cocquet* and bond pursuant to an act of parliament, which imposed the duty of so doing on the master personally, it was held that the owners of the vessel were entitled to maintain an action to recover back the amount of the over payment. (t) So, where a bill of exchange was given by the principal to his agent to get it discounted, and the latter indorsed it, and gave it to the defendant, who agreed to discount it, but without paying the full amount, made use of the bill for his own purposes, and the bill, when at maturity, was returned to the principal, and paid by him, it was held that the principal was entitled to maintain an action against the defendant, to recover the amount of the balance left unpaid; (u) and where an agent paid money on behalf of his principal by mistake, it was held that the principal was entitled to maintain an action to recover it back. (x)

If a number of persons agree to be jointly interested in a purchase which is to be made by one of them in his own name only, and the con-

(o) *Scrimshire v. Alderton*, 2 Str. 1182. *Escot v. Milward*, 1 Esp. 108. *Morris v. Cleasby*, 1 M. & S. 579. *Hornby v. Lacy*, 6 M. & S. 166.

(p) *Walker v. Birch*, 6 T.R. 262. *Houghton v. Matthew*, 3 B. & P. 489.

(q) *Drinkwater v. Goodwin*, 1 Cowp. 255. *Hudson v. Granger*, 5 B. & Ald. 27.

(r) *Ante*, ch. 7, sec. 5; 1 Roll. Abr. 98; pl.

12. *Drope v. Thaire*, Latch. 126. *Tracy v. Veal*, Cro. Jac. 228. *Ib.* 224.

(s) *Duke of Norfolk v. Worthy*, 1 Camp. 337.

(t) *Stevenson v. Mortimer*, 2 Cowp. 805. See also *Smith v. Sleep*, 12 M. & W. 585.

(u) *Bastable v. Poole*, 5 Tyr. 111; 1 C. M. & R. 410, s. c.

(x) *Ancker v. Bank of England*, 2 Doug. 687.

tract be made accordingly, all may join in suing for a breach of it. (y) If, again, the money of the principal be lent by the agent, the principal may maintain an action to recover it back, when the time of repayment arrives; but in such cases it must be distinctly and clearly proved, not only that the money advanced by A. was the property of B., but that B. was in reality the lender, although that fact might be unknown to the borrower; for if B. was to lend money to A., and A. was to make a further loan of it to C., B. would have no right of action against C. to recover it back. (z)

SECTION III.

OF THE AGENT'S RIGHT OF ACTION UPON SIMPLE CONTRACTS.

Bills of exchange and promissory notes.—The right of action upon bills of exchange and promissory notes is regulated by the law merchant, and rests upon peculiar grounds. If a bill or a note is made payable to one man for "the use," or "for and on behalf," or for the benefit of another, the payee is the proper party to bring an action upon the instrument. If, therefore, a bill of exchange is drawn, payable to an agent, to "the use," or for the benefit of the principal, the agent must sue as a trustee for the latter. (a)

Contracts by agents who have concealed their representative character.—When a written contract has been entered into by an agent on behalf of his principal, and the agent's representative character is not disclosed on the face of such written contract, the agent is entitled to maintain an action thereon, unless the principal interferes to prevent him.

So, if an agent carries on trade for his principal in his own name, and ostensibly on his own account, he is entitled to maintain an action in respect of goods sold by him in the course of that trade, unless the real principal interferes, and asserts his right to the sum due. (b) Factors generally sell the goods of their principal in their own names, and are alone known throughout their dealings and transactions to the purchaser,

(y) *Cothay v. Fennell*, 10 B. & C. 671. *Alexander v. Barker*, 2 Tyr. 147; 2 Cr. & J. 139.
(z) *Sims v. Bond*, 5 B. & Ad. 393; 2 N. & M. 616, a.c. *Calland v. Loyd*, 6 M. & W. 26. *Bolland, B., Alexander v. Barker*, 2 Cr. &

Jerv. 139.

(a) *Evans v. Cramlington*, Carth. 5; 2 Vent. 307. *Beckham v. Drake*, 9 M. & W. 92, 96.

(b) *Gardiner v. Davis*, 2 C. & P. 49.

and they are consequently entitled to maintain an action for the price. (c)
 “ Inasmuch as the agent is the person with whom the contract is made, it is no answer to an action in his name, to say, that he is merely an agent, unless you can also show that he is prohibited from carrying on that action by the person in whose behalf it was made. In such cases you may bring your action either in the name of the person *by* whom, or of the party *for* whom, the contract was made. (d)

Contracts by agents who have an interest or a special property in the subject matter of the contract.—If the agent himself has an interest, or a special property in the subject matter of the contract, and so unites in himself, to a certain extent, the character of a principal to that of an agent, he is entitled to maintain an action upon the contract. Thus, where a broker had advanced money on the credit of a cargo consigned to him by his principal for sale, it was held that he was entitled to an action in his own name against the buyer, although the sale note given by the broker mentioned the name of the principal; (e) and the buyer in such a case cannot set off a debt due to him from the principal in the action by the agent. But if, by the introduction of the name of the principal into the contract, the defendant has been prejudiced, he would be entitled to make use of that circumstance as a defence.

A bill of lading usually specifies that the master or captain of the ship is to deliver the goods on payment of the freight. The master, if he delivers the goods without such payment, becomes liable to the owner for so doing; and it has been held, therefore, that he may maintain an action for the freight against a consignee who has accepted goods under such a bill of lading. (f) A consignee accepted goods under a bill of lading, at the bottom of which was a memorandum, that the ship was to be delivered in sixteen lay days, “ 8*l.* per day demurrage to be paid for every laying day after the expiration of that time.” And it was held that the master was entitled to sue the consignee for the demurrage. (g) In the absence, however, of an express stipulation for the payment of demurrage, the master or captain cannot sue.

So, in the sale of goods by a factor, although the principal may be named or known at the time of the sale, yet as the factor has a general lien on the price of the goods in the hands of the buyer for the balance

(c) *Sadler v. Leigh*, 4 Camp. 196. *Snee v. Prescott*, 1 Atk. 248. *Johnson v. Hudson*, 11 East, 180.

(d) Bayley, J., *Sargent v. Morris*, 3 B. & A. 281. *Hall v. Smith*, 2 D. & R. 587; 1 B. & C. 406. *Alexander v. Barker*, 2 Tyr. 147. *Brasington v. Ault*, 9 Moore, 340. 2 Bing. 177,

s. c.

(e) *Atkins v. Amber*, 2 Esp. 493.

(f) *Brouncker v. Scott*, 4 Taunt. 4. *Shields v. Davis*, 6 Taunt. 65. *Sanders v. Vanseller*, 4 Ad. & E. N. S. 295.

(g) *Jesson v. Solly*, 4 Taunt. 52. *Brouncker v. Scott*, id. 1.

due to him on the general account with his principal, he has a right to require payment of the price to the extent of such general balance to himself, and not to the principal. The contract is in such cases the contract of the factor, although the principal has been named; and if the buyer, after notice from the factor of his claim on the price of the goods, should, in defiance thereof, settle with the principal, such settlement will constitute no defence to an action by the factor, for the latter has a prior right, (*h*) and the buyer cannot set off a debt due to him from the principal against the claim of the factor.

An auctioneer has a special property in goods which he is employed to sell, with a lien for the charges of the sale, the commission, and the auction duty, which he is bound to pay; he may, therefore, maintain an action against a buyer for the price of goods sold by him, although the sale was at the house of the principal, and the goods were publicly known to be the property of the latter. (*i*) But in these cases, if goods be sold, to be paid for at a future period, and be delivered to the buyer, without notice from the agent that he has any lien or claim on the price for duty, commission upon selling, or the like, and the buyer, in the absence of such notice, settles with the principal, then the agent's right of action is destroyed. (*k*)

A policy broker who effects a policy of insurance in his own name, as agent, at the same time declaring for whose use, benefit or interest, the same is made, is entitled to an action on the policy, (*l*) inasmuch as, by the usage of trade, he has a lien upon it for the premium which is generally paid by the broker, his commission, and the general balance due to him on the account between himself and his principal. (*m*)

And when an agent has entered into a contract of sale for an unnamed and unknown principal, it is no defence to an action brought by the agent upon that contract, to say that the principal afterwards repudiated it. The plaintiffs having applied to the defendant to sell them some oil, the latter at first refused, but on being informed that they were purchasing as brokers for a third party, he then assented. Bought and sold notes were made out and exchanged, in which notes the plaintiffs were described as the purchasers, and the defendant as the seller. The plaintiffs afterwards, under a general authority from their principal, and before the oil was delivered, sold the goods on the principal's account to Messrs. Buck and

(*h*) *Drinkwater v. Goodwin*, Cowp. 255. *Hudson v. Granger*, 5 B. & Ald. 31; Bull, N. P. 130.

(*i*) *Williams v. Millington*, 1 H. Bl. 81.

(*k*) *Coppin v. Walker*, 7 Taunt, 242; 2 Marsh, 497, s. c.

(*l*) *Wolf v. Horncastle*, 1 B. & P. 316, id. 346. n. (b.) Park on insurance, p. 605.

(*m*) *Whitehead v. Vaughan*, Cooke Bank. L. 576. *Parker v. Carter*, id. 578. *Man v. Skiffner*, 2 East, 529. *Mann v. Forrester*, 4 Camp. 60.

Co., but the bought and sold notes described the plaintiffs as the sellers. The principal, hearing of the latter contract, told the plaintiffs that he would have nothing to do with the oil, either as buyer or seller, and in this they acquiesced. The defendant afterwards refused to deliver the oil, and the plaintiffs being unable to fulfil their engagement with Buck and Co., were obliged to pay them a sum of money in satisfaction, the price of the article having risen in the market, and they then brought their action against the defendant, to recover compensation for the damage they had sustained by reason of the non-delivery of the oil, and it was held that the renunciation of the contract by the principal formed no objection to their right to recover. (n)

When a man has assigned to himself the character of an agent to another, whom he names as his principal, the law will not permit him to shift his situation, and to declare himself the principal, and the other a mere creature of straw, without giving to the defendant previous notice of the real situation in which he claims to stand. Having misled the defendant by assuming a character and situation which did not belong to him, he is bound to undeceive the defendant before bringing an action (o)

(n) *Short v. Spackman*, 2 B. & Ad. 962.

Ellenborough, C. J.

(o) *Bickerton v. Burrell*, 5 M. & S. 383.

CHAPTER X.

OF JOINT AND SEPARATE RIGHTS OF ACTION EX CONTRACTU.

SECTION I.—Deeds—The right of action regulated by the interests of the parties as disclosed upon the face of the deed and not by the terms of the covenant—A man cannot be divers times charged with the performance of one and the same duty—When one duty arises to all the covenantees, and all must sue; and when separate duties accrue to each, and separate actions must be brought—A joint damage to all creates a joint cause of action, and a several damage to each a separate right of action—A covenant with divers persons to pay them a sum of money is a joint covenant to all, and the specification of the share of each in the entire amount does not create a separation of interest—A covenant to pay distinct sums to each is a separate covenant, and separate actions must be brought—Separate covenants in one deed with divers persons to pay one sum *in solido* to one of them create a joint cause of action, and the party who is to receive the money cannot alone sue—Implied covenants moulded according to the interests of the parties being joint when the interest is joint, and separate when the interest is several—Tenants in common—Joint tenants and parceners.

SECTION II.—Simple contracts—Joint and several interests and joint and separate rights of action—Joint retainers and joint services by divers parties—Several retainers and separate employments—Promises moulded to suit the interests of the parties—Implied contracts and promises follow the consideration upon which they rest—A joint consideration moving from several persons creates a joint cause of action and a separate consideration moving from each a separate right of action.

SECTION III.—Partnership contracts—Of the right of action of partners upon deeds and simple contracts—If one partner contracts by deed on behalf of the rest he alone must sue—If the partnership is disclosed on the face of a simple contract the action must be a joint action by all the members of the firm—If the partner contracts in his individual character, not naming the partnership either the one partner or the firm may sue—When bills of exchange and promissory notes are made payable to one partner on behalf of the firm, the payee must sue—Contracts with firms by their trading name—Effect of changes in the members of the firm—Implied promises to firms in partnership—The implied contract follows the consideration; if it moves from the partnership all the partners must sue; if it moves from one partner alone he must bring a separate action—Of the joinder of nominal and dormant partners—Covenants and simple contracts by partners *inter se*—No implied promises between partners, except in respect of an account stated, and an ascertained balance.

SECTION IV.—Of survivorship amongst joint contractors, and of the right of action of particular

associations—Joint-stock companies and co-partnerships under the management of trustees or directors, or having the right of action vested in a secretary or public officer—Corporations—Incorporated joint-stock companies—Rights of corporators *inter se*—Parish officers and guardians of unions.

SECTION I.

OF JOINT AND SEPARATE RIGHTS OF ACTION UPON DEEDS INTER PARTES.

The joint or separate right of action upon a DEED *inter partes* is regulated by the interest of the covenantees in the subject matter of the contract, and the performance of the thing covenanted to be done, and not by the particular terms or language of the covenant itself. "The unqualified rule of law is, that the action shall follow the nature of the interest as disclosed on the face of the deed, without regard to the precise form of the covenant, so that the action must be joint where the interest in the subject matter of the contract is a joint interest, and several where the interest of each covenantee is a several interest." (a)

If the parties to a deed *inter partes* take a joint estate under the deed, and a covenant affecting the enjoyment of that estate is entered into with them and "each of them," the covenant is a joint covenant, and the action upon it must be brought by all the covenantees jointly, because they have a joint interest in the performance of the thing covenanted to be done, and the damage resulting from its non-performance is a joint damage, which is entire and indivisible, and cannot be apportioned. If, on the other hand, the covenantees have separate estates and interests, then a separate duty arises to each in respect of their several estates, and separate actions must be brought. If, for example, an estate be granted to three persons jointly, and covenants for title are entered into with them and "each of them," the covenants are joint, because they have a joint estate, and the words with each of them are mere words of amplification. If, on the other hand, they take separate and distinct estates, and the covenant be in terms joint, they shall have separate actions by reason of their several interests. (b)

If a covenant to do a particular act be entered into with several persons generally, as "with A., B., and C.," they have all *prima facie* a joint interest in the performance of it, and the one cannot maintain an action without the others, for the law will not permit a defendant to be harassed

(a) *Mills v. Ladbroke*, 13 Law J., N.S., C.P. 125.

(b) *Slingsby's case*, 5 Co. 18 B. *Windham's case*, ib. 7 b. *James v. Emery*, 8 Taunt. 245;

2 Moore, 195, s. c.; 5 Pr. 529. *Foley v. Addenbrooke*, 4 Ad. & E., N.S. 207, 208. *Hopkinson v. Lee*, 14 Law J., N.S. (Q. B.) 103.

with several suits in respect of one and the same cause of action; and if only one of them was allowed to recover, the courts would be at a loss for which to give judgment; but if it appears upon the face of the deed that the parties have several interests in the performance of the thing covenanted to be done, and that they each sustain a separate and independent damage by reason of its non-performance, they must bring separate actions; "for though the words" (with A., B., and C.,) "be *primâ facie* joint, they will be construed to be several, if the interest of each of the parties appearing upon the face of the deed shall require that construction." But the severalty of interest must be disclosed upon the face of the deed, and there must be a manifest intention that a separate and distinct duty should arise to each one of the covenantees in respect of the thing covenanted to be done, to warrant the interpretation of the covenant as a several covenant; and if within "the four corners of the deed" there is no distinct appearance of such severalty of interest, the covenant must be construed as a joint covenant, and a joint action by all the covenantees must be brought upon it. (c)

If, for example, a covenant is entered into with divers persons to keep a certain sea wall in repair, this is, *primâ facie*, a joint covenant; but if it appears upon the face of the deed that the covenantees are so many separate landowners, possessed of distinct and separate estates, the covenant shall be construed to be a several covenant, by reason of their several interests, and if the covenantor neglects to repair the sea wall, whereby the several lands of many of the covenantees are inundated, each of the parties injured must bring a separate action in respect of the particular damage sustained by each. In such a case, "the covenant shall be moulded," says Lord Coke, "according to the several interests of the parties, and each shall recover for a breach so far only as his own interest extends."

Certain articles of agreement were entered into between the master and the several part owners of a vessel who should execute the articles, and their several and respective executors, &c., to pay to them a certain sum of money, to be received for the hire of the vessel, in such parts and proportions as were set against their several and respective names, which "parts and proportions" were regulated according to their several shares in the ship; and it was held, that the interests of the parties being several, a joint action brought against the master by all of them could not be maintained, but that each one of the covenantees must sue severally in respect of his separate interest and estate. (d)

(c) *Sorbie v. Park*, 12 M. & W. 156—158.
Hopkinson v. Lee, 14 Law J., N. S. (Q. B.) 108.

(d) *Servante v. James*, 10 B. & C. 410; 5 M. & R. 299, s. c.

K. and B. being possessed of certain collieries, proposed to sell them, by dividing them into eighteen shares, of 4,000*l.* each, and certain parties, described as shareholders of a company about to be formed, agreed to purchase so many shares in them respectively as were set opposite their respective names. Covenants for title and further assurance, and for the completion of certain works in the mines, were then entered into with the purchasers, in respect of their several shares, and it was held that these covenants were several, by reason of the several interests of the covenantees, and that separate actions must be brought by each in respect of the damage sustained by each. "It would be a very inconvenient construction of the covenant," observes Tindal, C. J., "if we were to hold that the action must be a joint action in such a case; for it could not be brought without the consent of fifteen shareholders, who might be strangers to each other, and who have no authority to compel each other to join in the maintenance of the action." (e)

When, on the other hand, the parties to the contract have a joint interest in the fulfilment thereof, and sustain a joint damage by the breach of the engagement they have entered into, they must all bring a joint action. The herald painters entered into a covenant, "each of them with each, and every of the others," that they would bring their work of herald painting to one shop for sale, and that the money received should be afterwards divided between them in certain shares and proportions, and because one of the covenantors did not bring his work to the place aforesaid, the others brought a joint action of covenant against him, and after judgment by default, and a writ of inquiry executed; it was moved in arrest of judgment that the covenant was a several covenant, and that separate actions ought to have been brought; but the court held that the action was well brought jointly by the covenantees, "for the not bringing the work to the workhouse" was a joint damage, for it was first to be brought into the joint stock, and after that the division of profit was to be made. (f)

Several fiddlers entered into an agreement under seal not to play asunder unless "on my Lord Mayor's day," and bound themselves in 20*l.* "each to the other jointly and severally" for the performance thereof. One of them brought an action upon the deed, and assigned as a breach that the defendant had played by himself at a certain tavern;

(e) *Mills v. Ladbrooke*, 13 Law J., N. S. (C. P.) 125.

(f) *Saunders v. Johnson*, Ekin. 401; Comb. 230, a. c.

but it was held that they ought all to have joined, as they had a joint interest in the fulfilment of the contract. (g)

A covenant with several persons for the payment to them of a sum of money is a joint covenant with all, in the performance of which they have a joint interest so that one of them cannot sue for his particular share or proportion of the entirety, but all must join in one joint action for the whole, and the pointing out of the share which each is to take of the entire amount will not create a separation of interest so as to enable the parties to maintain separate actions.

An action of debt was brought upon a covenant contained in an annuity deed, whereby the defendant covenanted with the plaintiff and one A. B. their executors, administrators, and assigns, to pay to the plaintiff and the said A. B. and their executors, &c., *one* annuity or clear yearly sum of 80*l.*, “*in the shares and proportions following, i. e. the sum of 15*l.*, being one moiety of the said annuity or yearly sum to the plaintiff, his executors, &c., and the sum of 15*l.*, the remaining moiety thereof, unto the said A. B., his executors, &c.; and it was held that the covenantees had a joint interest in one entire annuity, to be paid to them in moieties; that the words “in the shares and proportions following,” only pointed out the mode of payment, and did not operate as a severance of interest, and that one of the covenantees consequently could not maintain an action without joining the other; (h) but if the deed had contained a distinct grant of a separate annuity to each of the two covenantees, then they would have had several interests, and it would have been necessary for them to have brought separate actions. (i) For if a covenant be made with ten persons to pay a distinct sum of money to each of them, a separate duty arises to each; and it is the same in contemplation of law as if ten separate and distinct contracts had been entered into with each one of the parties separately.*

A legacy of 40*l.*, which had been bequeathed to a brother and sister, was lent to the defendant, who gave the following “bill obligatory” under seal as a security for the repayment of the money. “This bill witnesseth that, I, Robert Sherwood, have received of Thomas Pretty 40*l.* to the use of Robert Shaw and Jane Shaw his sister, children of John Shaw deceased, equally to be divided between them, and the same

(g) *Spencer v. Durant*, Comb. 115.

(h) *Lane v. Drinkwater*, 1 C. M. & R. 599; 5 Tyr. 40; 3 Dowl. P. C. 223. *Byrne v. Fitzhugh*, 5 Tyr. 54; 1 C. M. & R. 613. *Eng-*

lish v. Blundell, 8 C. & P. 332.

(i) *Withers v. Bircham*, 3 B. & C. 254; 5 D. & R. 108, s. c.

to repay again at such time as shall be thought best for the profit of the said Robert Shaw and Jane Shaw, which sum of 40*l.* is the full bequest of their father." In an action brought by one of the Shaws upon this instrument, it was contended that it was a joint obligation to both, and that both ought to join in an action upon it; but the court held that "it should be several bills to them in one deed, and they should be divided debts of 20*l.* due to each. (*k*) So, where the defendant had covenanted with Lilly and Cardonel to receive the rents due to them in Ireland, and pay a moiety thereof to each of them, the said Lilly and Cardonel; it was held that the covenant was several, and that a separate action might be brought by Lilly alone. (*l*)

In a separate action brought by one of two joint covenantees, it appeared that the defendant had covenanted that he would not agree for the taking of the farm of the excise of beer and ale, for the county of York, without the consent of the plaintiff *and another*, and the plaintiff had alone brought his action for the breach, whereupon it was objected that it was a joint covenant and a joint interest in the two covenantees, and if the plaintiff could maintain an action alone, the other covenantee might bring a second action, and so the defendant would be divers times charged for a breach of one and the same duty; but the court held that there was no joint interest in such a case, but that each of the covenantees might maintain an action for his particular damages, for one of them might consent and secretly receive some satisfaction or recompense for so doing, and so the other would be remediless (*m*)

If a *covenant* in terms, JOINT and SEVERAL, has been entered into with divers persons, and one only of the covenantees has a beneficial interest, they must, nevertheless, all join in suing upon the covenant.

If a covenant, for example, is entered into with two persons jointly, and with each of them severally, for the payment of an annuity, or of a sum *in solido* to one of the two covenantees, both must join in bringing an action for the money, as one duty only is to be performed, and they have in contemplation of law a joint legal interest in the fulfilment of it, although one of the parties only is to take a beneficial interest. (*n*) And if two separate and distinct covenants be inserted in a deed, one with A. and another with B., for the payment of a sum of money to A., A. cannot alone sue for the money, for as one thing only is to be per-

(*k*) *Shaw v. Sherwood*, Cro. Eliz. 729.

(*l*) *Lilly v. Hodges*, 8 Mod. 167; 1 Str. 553.
Tippet v. Hawkey, 3 Mod. 264.

(*m*) *Wilkinson v. Lloyd*, 2 Mod. 82.

(*n*) *Anderson v. Martindale*, 1 East, 500, 501.

formed, and one sum of money paid, the law will not permit the covenantee to be harassed with two actions. (o)

If a bond be made to three persons to pay money to one of them, all ought to join in an action upon the bond, for they are as one obligee; and if he who is to receive the money dies, the other two who survive must bring the action, although they have no beneficial interest in the sum contained in the condition. (p) In these cases one of the covenantees or obligees has a sort of guardian over him in the person of the other, and there cannot be any separation of the interest for the purposes of action. (q)

IMPLIED COVENANTS.—All covenants arising from implication and construction of law are co-extensive with the interests of the parties in whose favour they are created; joint, if that interest is a joint interest, and if a several interest, several. If, therefore, a landlord grants a lease to A., B., and C., the action upon the implied covenants for title and quiet enjoyment must be brought by all the lessees jointly, because they have a joint estate. (r)

Tenants in common.—If the separate and distinct estates and interests of tenants in common are disclosed on the face of a deed, and a separate duty is reserved to each in respect of his particular estate, and the damages are consequently in their nature severable and apportionable according to the value of the share of each, separate actions must be brought, although the terms of the covenant may be joint; if, on the other hand, the deed contemplates the performance of one thing only, and of one duty in favour of all, they must bring a joint action, although they be possessed of several estates. If two tenants in common make a lease, reserving one entire rent to themselves, they must bring a joint action to recover such rent, although the rent be reserved to them, "according to their several and respective rights and interests;" but if there be several demises, and a separate reservation of rent to each tenant in common, then they must bring separate actions. (s) They must also sue separately when they have made several demises upon 4 *Geo. 2, c. 28*, for double value for holding over, and a joint action when they have made a joint demise. (t) But when an estate in land, with covenants annexed,

(o) *Hopkinson v. Lee*, 14 Law J., N. S. (Q. B.) 101. *Foley v. Addenbrooke*, 4 Ad. & E. N. S. 207.

(p) *Rolls v. Yate*, Yelv. 177.

(q) *James v. Emery*, 5 Price, 584.

(r) *Coleman v. Sherwin*, 1 Salk. 137; Comb. 163, s. c.

(s) Lit., sec. 316; Blackstone, vol. 2, chap. 13, IV. *Simpson v. Clayton*, 4 Bing. N. S. 781; 6 Sc. 496, s. c. *Powis v. Smith*, 1 D. & B. 490; 5 B. & Ald. 850. *Wallace v. M'Laren*, 1 M. & B. 516.

(t) *Wilkinson v. Hall*, 1 Bing. N. C. 713; 1 Scott, 676, s. c.

comes to two persons as tenants in common, they may in certain cases join or sever at their election in an action upon the covenants. (*u*)

Joint tenants.—As all persons jointly interested must bring a joint action, it follows that one joint tenant cannot sue without joining the other in actions upon covenants affecting the enjoyment of their joint estate. If two joint tenants make a lease of their land, reserving rent to one of them, it shall enure to both in respect of the joint reversion; (*x*) and the same rule holds good with respect to PARCENERS who have a unity of interest, title, and possession, and together constitute but one heir. One coparcener consequently cannot sue separately to recover her proportion of rents accruing to her and her fellows. (*y*) But if in express contracts respecting their joint property, covenants are entered into with one of them alone for the payment of rent, or the performance of certain services, such covenantee may alone sue. And when express covenants are entered into by tenants in common, joint tenants or parceners *inter se*, such covenants are either joint or several, according as they contemplate the fulfilment of one joint duty to all, exclusive of the covenantor, or the fulfilment of distinct and separate duties in favour of each one of the covenantees. (*z*)

SECTION II.

OF JOINT AND SEPARATE RIGHTS OF ACTION UPON SIMPLE CONTRACTS.

If, upon the face of a simple contract in writing, it appears that the promisees have a joint interest in the performance of the contract, and sustain a joint damage by reason of its non-fulfilment, they must bring a joint action (*a*) If, on the other hand, they take several interests and separate duties, and engagements arise in favour of each, and the damages consequently are several, and can be apportioned, separate actions must be brought. (*b*) But the surrounding circumstances, and the situation of the parties, and the nature of the consideration may be looked at, in

(*u*) *Midgeley v. Lovelace*, Carth. 289. *Kitchen v. Buckley*, 1 Lev. 109, post. ch. 11, s. 1.

(*x*) Co. Litt. 214 a., 180 b.

(*y*) *Decharms v. Horwood*, 4 M. & Sc. 400; 10 Bing. 529, s. c.

(*z*) *Wotton v. Cooke*, Dyer, 260 b.

(*a*) *Chanter v. Leese*, 4 M. & W. 295; 5 M. & W. 698, s. c., in error.

(*b*) *Palmer v. Sparshott*, 4 Sc. N. R. 743.

order to see who is really interested, and who has sustained the damages, and whether such damages are joint or several, in order to determine the number of the plaintiffs, and in whom the right of action rests. (c)

An agreement was entered into between the several part owners of a vessel who had separate shares in the ship, and the defendant, whereby the defendant was intrusted with the exclusive management and control of the vessel as ship's husband, for a voyage, and the defendant was to fit out the vessel and supply her with the necessary stores for a voyage, and *each* of the parties, part owners of the vessel, were to pay the defendant "*a proportion*" of the sums he should expend in that behalf, and the defendant promised, after the voyage had been completed, to render a full account of the ship and her concerns, and to divide the neat profits "*according to the proportions in the said ship*;" and it was held, that as the promisees had upon the face of the written contract several interests in the performance of the thing stipulated to be done, and each sustained a separate damage, the promise to account should be moulded according to the several interests of the parties, and be a distinct promise to each in respect of his separate share in the ship, and that any of the part owners consequently might maintain a separate action for the non-render of the account. (d)

If there be a joint retainer and employment of another by divers persons to do one thing for the benefit of all, they have a joint legal interest in the fulfilment of the contract by the party employed, although they may have several beneficial interests, and be possessed of separate shares in the subject matter of the contract. The plaintiff and two other persons, being possessed of separate shares in a ship, jointly employed the defendant to sell the entirety for them; and it was held that the plaintiff could not sue the defendant for his separate share of the purchase-money, for as the employment was to sell the ship *in solido* as one thing for all, the proceeds became joint property, and nothing less than an express agreement by the defendant, with the consent of all parties, would have enabled the plaintiff to maintain a separate action. But if each had employed the defendant to sell his particular share in the ship, then separate actions might have been brought by each. (e)

Two persons who had become bail for another called together upon an attorney, and employed him to surrender their principal; it was held, that one of them could not afterwards maintain an action against the attor-

(c) *Place v. Delegal*, 6 Sc. 258, 260; 4 Bing. N. C. 482, s. c.

(d) *Owston v. Ogle*, 13 East, 538.

(e) *Hatsell v. Griffith*, 2 Cr. & M. 679; 4 Tyr. 487, s. c.

ney for neglecting to effect the render pursuant to his undertaking, as the retainer was a joint retainer, and the law therefore would consider the undertaking to be a joint undertaking to both, upon which both must sue. (f)

In a joint action brought by two persons as plaintiffs, it appeared that their several cattle had been distrained, and that the defendant, in consideration of 10*l.* paid unto him by the plaintiffs, had promised to get the cattle restored to them; and it was objected, that as the cattle were the several property of the two plaintiffs, separate actions should have been brought; but the court held, that as the consideration was joint, and it was not known how much money the one plaintiff had given, and how much the other, the action was well brought by both jointly. (g) Neither did it appear in this case how many cattle the one party had lost and how many the other, the damage, therefore, was a joint damage to both, and compensation was properly sought for in a joint action; but if the damage had appeared upon the face of the contract to be several, as if the promise had been to restore so many beasts to the one and so many to the other, as the separate property of each, then separate actions should have been brought.

If, in consideration of certain services to be rendered by the promisees, a promise is made to pay them a sum of money, this is a joint promise in favour of all, upon which a joint action by all must be brought; and the pointing out the particular share that each is to receive of the sum so promised to be paid will not, in the case of simple contracts, any more than in the case of deeds, create a severance of interest, so as to enable the promisees to maintain separate actions against the promisor, to recover their respective proportions of the entirety. (h) But if one sum *in solido* is not to be paid in the first instance, and afterwards divided, but separate and independent payments are to be made to each, then separate actions must be brought. Thus, where the defendant promised one Thomas, that in consideration he would surrender a copyhold to the defendant, he, the defendant, would give unto his (Thomas's) two daughters 20*l.* a piece. One of the daughters having brought her action for a breach of this promise, it was moved in arrest of judgment that it was a joint promise to the two daughters, and that the one could not maintain a separate action; but per Glyn, C. J., "the law doth distinguish the interest though the promise be joint. The action is brought for one twenty pound due to one

(f) *Hill v. Tucker*, 1 Taunt. 7.

(g) *Evans v. Draper*, 1 Boll. Abr. 31, pl. 9,
2; Saund. 116, n. a.; Styles, 156, 157, 203.

(h) *Byrne v. Fitzhugh*, 1 C. M. & R. 597,
n. (a.); 5 Tyr. 54, a. c.

of the daughters ; the parties have distinct interests, so every one of them may bring the action." (i)

Implied promises.—In all actions upon implied contracts and promises, the number of the plaintiffs, and the joint or separate cause of action, depend entirely upon the nature of the consideration from which the implied promise arises. If that consideration moves from several persons jointly, the law raises a corresponding implied promise in favour of all, upon which all must sue ; but if there be several separate considerations moving from the parties separately and individually, the law implies a separate promise in favour of each, and separate actions must be brought. If several persons are employed upon a joint retainer to do certain work, or perform certain services, there is an implied joint promise of remuneration ; but if the parties each receive separate retainers, and each contribute a separate portion of the work, and separate services, independently of the rest, the law implies corresponding several promises. (k) Out of one joint retainer, also, may arise one entire duty in favour of all and separate duties to each one of the employers, in respect of which a separate action must be brought ; (l) and a retainer originally joint may become several, and give rise to separate causes of action, by reason of the subsequent conduct of the contracting parties. (m)

A carrier being in want of assistance upon the road, engaged two persons separately to aid him with their horses. Each sent three horses, with a carter to attend them, and the six drew the waggon, and they were directed to send in their *several* accounts. The two brought a joint action for the hire, but it was held not to be maintainable, as they had no joint interest. (n)

Implied promises in respect of MONEY PAID, LENT, or RECEIVED.—If a sum of money *in solido* is advanced by several persons, the law raises an implied joint promise of repayment in favour of all ; but if several sums be advanced separately by each, the law implies a corresponding separate promise in favour of each.

Two out of three joint contractors, against whom judgment had been recovered, borrowed a sum of money upon their joint credit to satisfy the judgment ; and it was held that they might maintain a joint action upon the implied promise of contribution against the third ; but if each had contributed his share of the money out of his own funds, or had borrowed it on his separate credit, then the law would have implied a separate

(i) *Thomas v. —*, Styles, 461.

(k) *Bell v. Chaplain*, Hardres, 321.

(l) *Story v. Richardson*, 6 Bing. N. C. 130.

(m) *Garrett v. Taylor*, 1 Esp. 117.

(n) *Smith v. Hunt*, 2 Chit. 142.

promise in favour of each, upon which separate actions must have been brought. (o)

Two joint owners of a sum of money, travelling together on the highway, were robbed of the money, and thereupon they brought a joint action against the hundred, when it was objected that they ought to have sued separately; but the court held that they were properly joined, because they were jointly entitled to the damages to be recovered. If, however, there had been several sums of money, the separate property of the parties robbed, then separate actions should have been brought. (p)

A. B. and C., being assignees under a commission of bankruptcy, incurred legal expenses on account of the bankruptcy to the amount of 208*l*. A. and B. each paid the sum of 104*l*. in discharge of the solicitor's bill, and brought a joint action against C. upon an implied promise for contribution; when it was held, that they could not sue jointly, but must each bring a separate action, as the law would imply a separate promise in favour of each, in respect of the money which each had paid on account of C.; (q) but if they had borrowed the money so paid on their joint credit, or if an agent had paid it for them on their joint account, then there would have been an implied joint promise to both, upon which a joint action must have been maintained against C. (r)

And although several persons may contribute severally in equal shares towards one entire amount, yet if their several contributions are put together and advanced as one sum *in solido*, the implied promise of repayment is a joint promise to all in respect of the entire sum so advanced, and not a several promise to each in respect of their several contributions thereto. (s) If several persons contribute their several proportions of a sum of money which is to be paid under a special contract to which they are parties, and the money is advanced as a sum *in solido*, and the contract is afterwards abandoned or rescinded, the implied promise to refund the money arises in favour of all. (t)

"The Trimmer" privateer, of which the plaintiff and two other persons of the name of Grant were joint owners, took a prize, in conjunction with another privateer, of which the defendant was owner. The prize was condemned and sold, and shared by agreement between them; but afterwards the sentence of condemnation was reversed, and restitution awarded, with costs. The two Grants having become bankrupt, the plaintiffs paid the

(o) *Osborne v. Harper*, 5 East, 225, 229.

(p) *Winterstoke Hundred's case*, Dyer, 370, a. pl. 59.

(q) *Brand v. Boulcott*, 3 B. & P. 235. *Kelby*

v. Steel, 5 Esp. N. P. C. 192.

(r) *Osborne v. Harper*, 5 East, 229.

(s) *May v. May*, 1 C. & P. 44.

(t) *English v. Blundell*, 8 C. & P. 332.

whole amount, and then brought their action against the defendant, upon an implied promise from him to pay his moiety of the restitution money, and costs; but it was held that they could not maintain the action, for either the money was paid on a partnership account of the joint owners of the Trimmer, when the two Grants, who had become bankrupt, or their assignees, should have been joined as plaintiffs, or it was a separate payment by each individual of the plaintiffs, when separate actions should have been brought by each. (u)

SECTION III.

OF THE RIGHT OF ACTION OF PARTNERS.

Contracts under SEAL.—As an action upon a contract under seal can only be maintained by the parties with whom the contract is in terms made, it follows, that if a deed be entered into by one or more of several partners on behalf of the co-partnership generally, the action upon such contract must be brought by the partners with whom it was made, and not by the co-partnership in whose behalf it was made.

If upon the face of a simple contract in writing, it appears that the contract has been entered into by, or on behalf of, a firm in partnership, all the members of the firm must sue jointly thereon. (a) If the joint interest and joint consideration are not disclosed upon the face of the writing, but the contract is entered into with one of the partners in his individual capacity, and apparently on his own account, but in reality on behalf of the firm of which he is a member, the partner so contracting stands in the position of an agent dealing on behalf of an undisclosed principal; and either the partner with whom the contract is so made, or the firm, as the parties really interested in it, may bring the action, (b) the defendant being of course entitled in the latter case to set up against the firm any defence that he would have had to an action brought by the one partner alone, as in the case of principal and agent. (c) If a written contract for the sale of

(u) *Graham v. Robertson*, 2 T. R. 282. It has now been held that the law will raise no implied promise of contribution as between partners. *Sadler v. Nixon*, 5 B. & Ad. 938.

(a) *Lewis v. Edwards*, 7 M. & W. 300, 305.

(b) *Alexander v. Barker*, 2 Tyr. 147. *Beck-*

ham v. Drake, 9 M. & W. 96, 98; 11 M. & W. 317, s. c., in error.

(c) *Stracey v. Deasy*, 7 T. R. 361, n.; 2 Rep. 469, n. *Gordon v. Ellis*, 13 Law J., N. S. C. P. 179.

goods, the joint property of several partners, be entered into by one of them in his own name only, all the partners may sue upon it, although the purchaser had at the time no knowledge that there were other persons interested in the transaction besides the one he had contracted with. (d)

PROMISSORY NOTES and BILLS OF EXCHANGE payable to one of the several partners.—If, however, a promissory note or a bill of exchange has been made payable to one of the partners to secure a debt due to the firm, the rest cannot join in suing thereon; for, as we have before seen, bills of exchange and promissory notes form a class of contracts *sui generis*, regulated by the law merchant, and can only be sued upon by those whose names appear upon them as the payees. (e)

COVENANTS, BONDS, and SIMPLE CONTRACTS, with firms in partnership by their TRADING NAME.—If a bond or covenant is entered into with a firm in partnership by its ordinary trading appellation, evidence is admissible to show who were the individuals actually constituting the firm at the time the contract was entered into, so as to give them the benefit of it. An action, for example, having been brought upon a bond given to the "Widow Moller and Son," it was proved at the trial that the Widow Moller had been dead several years at the time the bond was executed, and that the plaintiffs, her sons, were then carrying on the trade under the old firm; and Mansfield, C. J., held, that the plaintiffs might prove by oral testimony that they were the persons meant by the designation "Widow Moller and Son. (f)

But the persons who were actually partners, and constituted the firm at the time the bond or covenant was entered into, are the only parties entitled to maintain an action upon it, for the right of action upon a contract under seal cannot be made to shift from one person to another, according to the varying accidents or exigencies of the moment, but must be brought by the parties with whom, in construction and contemplation of law, it was actually made.

If a bond, for example, be given to the existing partners of a firm, or to a firm generally by its trading name, "and to all such persons who may afterwards be added to the firm," or to certain persons, being governors or directors of a society or company, "and to their successors," the original obligees are the only parties who can sue upon the instrument. (g)

(d) *Skinner v. Stocks*, 4 B. & Ald. 437. *Robson v. Drummond*, 2 B. & Ad. 308.

(e) *Siffkin v. Walker*, 2 Campb. 807. *Emly v. Lye*, 15 East, 7. *Bawden v. Howell*, 4 Sc. N. E. 381, ante.

(f) *Moller v. Lambert*, 2 Campb. 548. *The*

Queen v. Wooldale, 14 Law J., N. S. (Q. B.) 41.

(g) *Danco v. Girdler*, 4 B. & P. 42. *Pemberton v. Oakes*, 4 Buss. 154. *Littledale, J.*, 10 B. & C. 127; 5 M. & R. 93. *Chapman v. Beckinton*, 3 Ad. & E., N. S., 708—721.

Effect of changes in the members of the firm.—When, in the course of a partnership, new partners are admitted, or old partners retire, without any change in the appellation of the firm, the contracts and securities which remain with the partnership, and which have been entered into with the firm by its trading appellation, whether they be deeds or whether they be simple contracts, should be sued upon by those who were members of the firm at the time such contracts were made or entered into, unless they are negotiable securities, and have been regularly indorsed in the usual way to the new partnership. The right to the enforcement of a contract, whether it be under seal or under hand merely, is what is technically termed a *chose in action*, and cannot, as will presently be shown, (A) be transferred from hand to hand, and be made to shift from one person to another, at the will and pleasure of the parties in whom such right of action is by law vested. If a simple contract, therefore, has been entered into with a firm in partnership by its trading name, a person who has subsequently entered into partnership cannot be joined with the old members of the firm as a plaintiff in an action upon such contract, for the contract was not entered into with him, and no right to sue upon it can be transferred to him by any private arrangement between the partners, concluded without the knowledge or approbation of the promisor. (i) The right of action in such a case continues in the firm as constituted at the time the contract was made, and all who were the acting ostensible partners at that time must sue upon it.

A promissory note, intended to be a continuing security, was given to a banking-house, to secure advances, to be made from time to time by the firm. Several changes in the firm took place, and upon each change the note was transferred in account from the old firm to the new, and interest was paid by the defendants to the successive firms as upon a debt owing to the persons successively constituting the banking-house. The note, however, had never been indorsed from the old firm to the new, and it was held that the action upon it must be brought by the original payees, the persons who constituted the firm at the time the note was given, and not by the parties who constituted the firm at the time the action was brought. (k)

A bond or guarantee, however, given to a co-partnership, is absolutely determined and put an end to by any change in the constitution of the

(A) Post ch. 11.
(i) *Wilsford v. Wood*, 1 Esp. 183. A liability to the new firm may, however, with the consent of all parties, be substituted in lieu of the

liability to the old firm. *Moore v. Hill*, 2 Peake 10, post, ch. 11, s. 2.

(k) *Pease v. Hirst*, 10 B. & C. 122; 5 M. & R. 92, 93.

firm, such as the retirement or death of an existing partner, or the introduction of a new partner, unless it plainly appears to have been the intention of the parties that the security should be a continuing security, and should remain in force throughout all changes in the co-partnership. (*l*)

Implied contracts and promises with firms in partnership.—As the joint or separate right of action upon implied promises, depends, as we have before seen, upon the nature of the consideration, being joint when the consideration is entire, and moves from several persons jointly, and separate when there is a separate consideration moving from each of the conducting parties, it follows, that if a service or benefit, out of which the law implies a promise, moves from a firm in partnership, the promise so implied is a joint promise in favour of all the partners upon which all must sue. (*m*) If, on the other hand, it moves from the one partner separately and individually on his own account, it is a private contract in which the partnership has no concern, and a joint action by the firm cannot, consequently, be supported. (*n*) Whenever the services, however, have been rendered by the one partner on the partnership account, and the remuneration for such services belongs to the joint purse, all the partners are jointly interested in the consideration, and a joint action may be brought by all. (*o*) When the money of the partnership has been lent by the one partner alone, the firm may sue upon the implied promise of repayment, (*p*) but if they permit one partner to deal with the partnership property in his own name, they cannot stand in a better situation than the one partner who has so acted. (*q*)

And where a person lends money in his own name, and nominally on his own account, but really on account of, and as the loan of another, the real lender, who sues for the money, must show clearly and distinctly that the advance was made on his account, and as a loan from *him*, although that fact might at the time be unknown to the borrower, for, as we have before seen, “if B. lends money to A., and A. makes a further loan of it to C., B. would have no right of action against C. to recover it back.” (*r*)

Special contracts, promissory notes, and bills of exchange founded upon a consideration moving from the partnership, or given to secure the pay-

(*l*) *Sims v. Cooke*, 8 Moore, 588. *Dry v. Davy*, 10 Ad. & E. 30. *Myers v. Edge*, 7 T. R. 254. *University of Cambridge v. Baldwin*, 5 M. & W. 580.

(*m*) *Bond v. Pittard*, 3 M. & W. 357. *Lambert's case*, Godb. 244. *Townsend v. Neale*, 2 Campb. 189.

(*n*) *Brandon v. Hubbard*, 4 Moore, 367; 2 B. & B. 11, s. c.

(*o*) *Arden v. Tucker*, 4 B. & Ad. 815.

(*p*) *Alexander v. Barker*, 2 C. & J. 139, 140; 2 Tyr. 140.

(*q*) *Lucas v. De la Cour*, 1 M. & S. 249. *Gordon v. Ellis*, 13 Law J., N. S. (C. P.) 182. *Robson v. Drummond*, 2 B. & Ad. 303.

(*r*) *Sims v. Bond*, 5 B. & Ad. 389; 2 N. & M. 616.

ment of money advanced or goods sold by the firm, should be given to the partnership by its ordinary trading name, in order that the contract may correspond with the consideration upon which it is founded; for if an action be brought by one partner upon a promissory note addressed to him individually, to secure a debt due to the firm, and it should become necessary, from the invalidity of the instrument or from any other cause, to resort to the promise implied by law in respect of the original consideration, the action would fail, because the proof of that consideration would necessarily disclose an implied contract with all the members of the firm jointly. And in the case of one partner suing alone upon a contract made with him individually, care must be taken that the issue can be proved without disclosing the interest of the other partners, for if it appears from the plaintiff's case that the contract is founded upon a joint consideration moving from the partnership, the law would imply a corresponding joint promise, and the action by the one partner alone would fail. (*s*)

Nominal and dormant partners.—A mere nominal partner who has no interest whatever in the business, and does not participate in the profits of the concern, and has, consequently, never been entitled to the fruits of the contract upon which the action is brought, need not be joined as a plaintiff, (*t*) except in the case of written contracts on which his name appears, (*u*) nor is it necessary for a dormant partner, whose name does not appear in the firm, to join the acting ostensible members of a partnership in an action on a contract made with them; (*x*) and if an acting partner withdraws his name from the firm, but continues to share the profits as a dormant partner, he need not be made a plaintiff in an action upon contracts entered into with the firm, subsequent to the withdrawal of his name, (*y*) but a dormant partner, standing, as he does, in the position of an undisclosed principal, may, of course, in all cases, join the other partners in an action upon a contract entered into with the partnership. (*z*)

Covenants by partners inter se.—If any one particular partner enters into a contract or stipulation with the rest, such as an engagement not to trade on his own account, not to sell merchandize without the assent of the others, &c., they must all join in suing upon this contract, for they

(*s*) *Garrett v. Handley*, 3 B. & C. 462; 5 D. & R. 819, s. c.

(*t*) *Barber v. Parker*, 1 T. R. 287. *Harrison v. Fitzhenry*, 3 Esp. 237. *Parsons v. Crosby*, 5 Esp. 199. *Glossop v. Colman*, 1 Stark. 25. *Davenport v. Rackstrow*, 1 C. & P. 89. *Teed v. Elworthy*, 14 East, 209. *Mawman v. Gillet*, 2 Taunt. 825, n. *Kell v. Nainby*, 10 B. & C. 20.

(*u*) *Guidon v. Robson*, 2 Campb. 304.

(*x*) *Lloyd v. Archdowle*, 2 Taunt. 324. *Brasington v. Ault*, 9 Moore, 340; 2 Bing. 177, s. c.

(*y*) *Leverick v. Shaftoe*, 1 Esp. 468.

(*z*) *Skinner v. Stocks*, 4 B. & Ald. 437. *Robson v. Drummond*, 2 B. & Ad. 303, and see ante, ch. 10, s. 2.

have a joint interest in the performance of it, and the breach operates as a joint damage to all. (a)

Several persons who had entered into an indenture of co-partnership covenanted "each of them respectively for himself, his executors, &c., to and with the other and others of them respectively, and his and their respective executors, administrators, and assigns," that there should be a joint stock, &c., and that certain prize brandies should be bought by them in partnership, and that none of the parties during the time of the partnership should sell or trade in brandy wines by himself only, or in company with any other, but only upon the same joint account, and that no brandies which should come to the hands of any of the parties should be sold by him without the assent of the others, &c. A separate action having been brought by one of the partners against another for a breach of this contract, it was held, that as all the partners were equally interested in the performance of it, and had sustained equal damage by the breach, all ought to have joined in the action, notwithstanding the several language of the covenant upon which it was brought. (b)

So, where the herald-painters entered into a covenant, as before-mentioned, "each of them with each and every of the others," to bring their work to one shop for sale, and to divide the proceeds between them, it was held, that the covenant was joint in law, though several in words, and that the action was properly brought by the partners jointly. (c) In such cases the contract of the defendant is with all the rest, excluding himself, and all the rest are joint tenants against him, for "if there be twenty partners, and one of them covenant with all the rest, yet he is in that respect several from them all, and they all joint against him." (d)

Several persons agreed by simple contract to establish a stage-coach, and each undertook to horse it for one stage, and mutually and reciprocally bound themselves each to the other in certain stipulated penalties, for which one of their number alone was empowered to sue, the amount of such penalties to be divided amongst all the parties to the agreement who should not have subjected themselves to any such penalty or forfeiture, to the exclusion of the defaulter; and it was held, that the right of action for the penalty was by the agreement duly vested in the one partner so appointed to sue, and that a defaulter could not object to the non-joinder of the others. (e)

(a) *Spencer v. Durant*, Comb. 115; 1 Show. 8, s. c. *Thimblethorpe v. Hardesty*, 7 Mod. 116; ante, s. 1.

(b) *Eccleston v. Cliphsham*, 1 Saund. 153; 2 Keb. 338, 339, 347, 385, s. c.

(c) *Saunders v. Johnson*, Skinn. 401; Comb.

238, s. c.

(d) *Thimblethorpe v. Hardesty*, 7 Mod. 116. *Vesey v. Mantell*, 9 M. & W. 323.

(e) *Radenkurst v. Bates*, 11 Moore, 421; 3 Bing. 470; post. sec. 4.

The plaintiff and defendant and others entered into the following agreement: "Being desirous that the communication between London and Herne Bay should be kept open during the winter, we hereby authorise Mr. B. (the plaintiff) to charter a steam-boat for the purpose, and to make the necessary arrangements, on our joint account, each of us taking a proportionate interest in this enterprise, according to the amount subscribed, and the profit or loss to be divided amongst us in proportion to our subscription. To form a fund for defraying the expense, we have each paid 10*l.* per cent. on the amount of our subscriptions, and we hereby bind ourselves and agree to pay to Mr. B. (the plaintiff) such further instalments, each of us in proportion to his subscription, as it may be necessary to call for, from time to time, should the earnings of the boat not be sufficient to pay the expenses. It being, however, understood, that our liability is not to extend beyond the amount subscribed by us respectively." It was held, that the effect of this agreement was to constitute a partnership between those who subscribed in proportion to their subscription, and that the plaintiff might sue the defendant upon the special agreement, for not performing his undertaking to pay the plaintiff the instalments from time to time, in addition to the 10*l.* per cent. to form a fund to meet the expenses, in the same way that an action might be maintained by one partner on a covenant in co-partnership articles, to pay another a certain sum, if the partnership assets should prove deficient. (f)

But the law raises no implied promise as between partners in respect of things done on the partnership account for the common benefit of all. If one partner, for example, contributes his work and labour, or expends his money, or supplies goods on account of the partnership, the law raises no implied promise from the rest in respect of the services rendered or the things furnished, or the money paid or advanced, although such money may have been paid by compulsion of law in discharge of a partnership debt. (g) The things done have been done by the one partner for himself as much as the rest, and if he intends to secure a remuneration for his services, or compensation for losses he may sustain, or payment for goods supplied, or the re-payment of money advanced, he must do so by express contract. (h)

It has been held, therefore, that a surveyor who joins an association and subscribes money for the purpose of obtaining an act of Parliament,

(f) *Brown v. Tapscott*, 6 M. & W., 123.

(g) *Bovill v. Hammond*, 6 B. & C. 149. *Milburn v. Codd*, 7 B. & C. 419. *Sadler v. Nixon*, 5 B. & Ad. 936. *Teague v. Hubbard*, 8 B. &

C. 345.

(h) *Elgie v. Webster*, 5 M. & W. 518. *Vennings v. Leckie*, 13 East, 9. *Bedford v. Bruton*, 18 C. 261.

authorizing the construction of a railway, cannot maintain an action for work done as a surveyor in the promotion of the undertaking, (i) in the absence of an express contract with the subscribers individually, for a specific remuneration.

Neither will the law raise any implied promise in respect of unliquidated claims and demands, nor enforce special contracts between partners for the payment of uncertain and unascertained sums of money which involve the necessity of going into the partnership accounts, and ascertaining the amount of profit that may have been realized, and what there is to divide; but when a final account has been stated and settled between two partners, and a distinct sum appears upon the face of such account to be due from the one to the other, the law considers the parties against whom the balance appears, to be indebted to the other in respect thereof, and will imply a promise from him to pay over the amount. (k)

SECTION III.

OF SURVIVORSHIP AMONGST JOINT CONTRACTORS, AND OF THE RIGHT OF ACTION OF JOINT STOCK COMPANIES, CORPORATIONS, AND PARISH OFFICERS.

Survivorship of JOINT CONTRACTORS.—When several persons take a joint interest in, and have a joint right of action upon a contract, and one of them dies, the action must be brought in the name of the survivors, and the personal representative of the deceased cannot be joined, nor can he sue separately.

A *joint* contract always survives, whatever may be the beneficial interests of the parties under it. Thus, if a covenant is made with A., his executors, administrators, and assigns, and with B. and her assigns, to pay an annuity to A., his executors, &c., during B.'s life, there being here one entire duty to be performed, the covenant is a joint covenant to A. and B., in which they have a joint legal interest, although the benefit be for A. only; and therefore, on the death of A., the right of action upon this covenant survives to B. (a) So, if a bond is made to three persons to pay a sum of money to one of them, who afterwards dies, the two survivors are the

(i) *Holmes v. Higgins*, 1 B. & C. 74.

(k) *Wray v. Milestone*, 5 M. & W. 21. *Jack-*

son v. Stopherd, 2 C. & M. 361.

(a) *Anderson v. Martindale*, 1 East, 497.

only parties who can maintain an action upon the instrument, although they have no interest in the sum mentioned in the condition. (b) And if two persons advance a sum of money by way of mortgage, and take the mortgage to them jointly, and one dies, the whole interest and right of action at law go to the survivor; but in equity, the representative of him who is dead shall have his proportion. (c)

It follows, therefore, that if all the parties jointly interested in a contract die, the right of action vests in the personal representatives of the one who survived the others, and the executors or administrators of those who died previously cannot be joined.

The common law, for the furtherance of trade and commerce, so far excludes the doctrine of survivorship from among merchants, (d) as to permit the interest in joint contracts of a commercial character to pass, in case of death, to the personal representative, so as to give him an action of account against the survivors for the share of the deceased, but the remedy by way of action upon the contract always survives. Thus, if two partners in trade appoint a factor, and one dies, the personal representative of the deceased cannot join in an action against the factor upon the partnership account. (e)

Where, however, the parties to a contract take several and distinct interests, the action is properly brought in the name of the personal representative of the deceased; as where C., by deed reciting the grant of two distinct annuities to A. and B. during the life of the grantors, and the survivor of them, covenanted with A. and B., and their executors, &c., to pay the annuities, or either of them, when the grantors should make default in payment, and A. afterwards died; it was held, that the interest in the annuities being several, the covenant was likewise several, and default having been made in the payment of A.'s annuity, that an action was properly brought by his executor against C. (f) If a person acknowledges that he has received 40*l.* to the use of A. and B., *equally to be divided between them*, these words create, as we have before seen, distinct and separate debts of 20*l.* to each; so that if one of them dies, his personal representative may maintain an action for the 20*l.* (g)

Co-partnerships under the management of TRUSTEES or DIRECTORS.
In order to provide efficient and continuing securities for co-partnerships,

(b) *Rolls v. Yate*, Yelv. 177. *Tippet v. Hawkey*, Bull. N. P. 158.

(c) *Petty v. Steward*, 1 Ch. rep. 81.

(d) *Jus accrescendi inter mercatores pro beneficio commercii locum non habet.* Co. Litt. 182.

(a) *Hammond v. Jethro*, 2 Brownl. & Gold, 99.

Rex v. Collector of Customs, 2 M. & S. 223.

(e) *Martin v. Crump, Ltd.* Bayd. 340; Comb. 474; 2 Salk. 444.

(f) *Withers v. Bircham*, 3 B. & C. 254; 5 D. & R. 106.

(g) *Shaw v. Sherwood*, 1 Cro. Eliz. 729.

and to obviate the inconvenience which arises from deaths and changes in the firm when a large number of persons are associated together, recourse has been had to trustees, who have been appointed to conduct the business of the co-partnership, and enter into contracts for the general benefit of the concern. We have already seen that the right of action cannot be transferred from one set of partners to another at their own will and pleasure, and be made to fluctuate from one set of persons to another according to the fluctuations of a changing body of men; but the intervention of trustees gets rid of much of the difficulty.

"If a contract," says Lord Ellenborough, "were made with the commoners of a certain common, the successive commoners could not come into court and sue upon it, but a trust may be created for such a body, which would extend to those who were successively clothed with the right of the original body. A bond might be given to a trustee to secure the performance of certain services to them, and there would be no difficulty in applying it to the use of the commoners for the time being, whoever they might happen to be, during the period for which the services were to be performed." (h) "A man may well," says he, "agree to serve a fluctuating body, such as the subscribers to the rooms at Bath. A contract with the body itself at large would not have done, but a contract with trustees for the benefit of the body gets rid of all the difficulty." (i)

A co-partnership called "The Globe Insurance Company," composed of a numerous and indefinite body of persons, liable to be changed every day, constituted seven of their number trustees for them, with whom all contracts for the benefit of the company were to be entered into. A bond was given to these trustees, to secure the faithful conduct of a clerk to the company, and it was held that it might be enforced at any time by the trustees, or the survivors of them, notwithstanding the changes and fluctuations in the members, so long as the clerk continued in their service. "Here the bond," observes Lord Ellenborough, "has been given to trustees, who are under no difficulty in suing upon it in their own names, and the only question is as to the description of persons meant to be designated under the term *company*. If it had not been understood by the contracting parties that the company therein mentioned meant a fluctuating company, we must suppose that they contemplated that the bond might probably be gone in twenty-four hours, or before the wax on the parchment was cold." (k)

When a number of persons are associated together in partnership in

(h) *Metcalf v. Bruin*, 12 East, 404—406.

(k) *Metcalf v. Bruin*, 12 East, 406.

(i) *Ib.* p. 406.

this manner, the trustees, or directors, have the general conduct and management of the co-partnership, and form the acting partners of the concern, whilst the others contribute merely their capital, and receive accruing profit in proportion to their interests, and stand, consequently, in the position of dormant partners. The trustees and directors, who represent the company in all its dealings and transactions with strangers, are usually appointed by a deed of settlement, and all simple contracts entered into with the company by name, or with one or more of the directors or trustees, are, in contemplation of law, entered into with all of them jointly, as the acting partners performing the ostensible acts of the co-partnership, and they must all, consequently, be joined as plaintiffs in actions upon such contracts. Neither the bankruptcy, nor the non-attendance of a director at the board at the time the contract was entered into, will form an excuse for his being omitted as a plaintiff, unless it be shown that, in either of such events, he ceased to be a director according to the provisions of the deed of settlement or contract of co-partnership. His character of director must be shown to have been legally determined at the time the contract was entered into, in order to justify the non-joinder. (l) The trustees or directors, also, as the acting partners, are the proper parties to sue upon all implied contracts arising out of partnership transactions, such as implied promises to refund the money of the co-partnership paid by the trustees upon a consideration that has failed, or under circumstances which create a right to recover it back. (m)

As the directors constitute the acting partners of the concern, all transactions with them are regulated by the ordinary law of partnership, and changes in the constitution of the board will, in general, have the same effect upon their right of action as changes in the constitution of an ordinary co-partnership. Newly-appointed trustees, who were not members of the board at the time a contract was entered into, cannot be joined as plaintiffs with the other trustees or directors in an action brought to enforce such contract, any more than the newly-admitted members of an ordinary partnership.

Trustees or directors, on the other hand, who have retired from the management, must be joined as plaintiffs in actions upon contracts entered into with the company at the time they were members of the board. The right to bring actions on behalf of the company being by law vested in all the directors jointly, it is not competent for the partners or shareholders, by arrangement amongst themselves, to transfer to one or more of the

(l) *Phelps v. Lyle*, 10 Ad. & E. 113.

(m) *Lefevre v. Boyle*, 3 B. & Ad. 880. *May-*

ginson v. Harper, 2 C. & M. 322.

directors the right of bringing actions on behalf of the company; and an authority, therefore, in the deed of settlement, to some one or more of the directors to bring actions in his or their name against persons who are not parties to the deed, nor members of the co-partnership, will not justify an action brought in pursuance thereof. (*n*) But they may empower one or more of their number to sue, on behalf of the rest, all such of the members of the firm as have violated the special contracts and engagements subsisting between the partners themselves, such an agreement being, in effect, an undertaking not to object that all who otherwise ought to have joined in the action were not joined. If, therefore, several persons form a company for the purposes of trade, and agree that it shall be conducted by two persons, who shall be trustees so far that all rights of action shall be in them, one who is a shareholder, and has executed the deed, cannot object to the non-joinder of the rest in an action brought against him thereon. (*o*)

CO-PARTNERSHIPS and ASSOCIATIONS authorized to sue in the name of their SECRETARY, TREASURER, or PUBLIC OFFICER.—In order to obviate the inconveniences ensuing from changes in the board of trustees or directors, and the technical objections that might arise from the non-joinder as plaintiffs in an action upon a contract of all who were directors at the time the contract was entered into, recourse has been had to the legislature, and acts of parliament have from time to time been passed, empowering certain banking, trading, and other companies and co-partnerships, to sue in the name of their managing officer—or their treasurer or secretary for the time being, and providing that the actions so brought shall not abate or be discontinued by the death or removal of such nominal plaintiff whilst the action is pending, but that the officer for the time being shall always be deemed plaintiff or defendant in every action prosecuted or defended by the co-partnership. (*p*)

Among the companies and associations invested with this power of suing and being sued in the name of a treasurer, secretary, clerk, or other public officer, are the commissioners of turnpike roads, certain dock and insurance companies; friendly societies and savings banks; and by the act of 1 Vict. c. 73, certain trading and other companies may be clothed with this privilege by letters patent. (*q*)

(*n*) *Radenhurst v. Bates*, 3 Bing. 470; 11 Moore, 421, s. c. *Davies v. Hawkins*, 3 M. & S. 488.

(*o*) *Davies v. Hawkins*, 3 M. & S. 488

(*p*) 7 Geo. 4. c. 46, s. 9. *Whitmore v. Wilks*, 1 M. & M. 214. *Guthrie v. Fisk*, 3 B. & C. 178; 5 D. & R. 24, s. c.

(*q*) 3 Geo. 4, c. 126, s. 74; 39 Geo. 3. c. 69, s. 134; 39 & 40 Geo. 3, c. 47, s. 150; 53 Geo. 3, c. 216; 10 Geo. 4, c. 56, s. 21; 57 Geo. 3, c. 130. As to the general regulation and management of joint stock companies, see 7 & 8 Vict. c. 110, c. 111, c. 118; and as to the right of action of the public officer against members of

The right of action of the public officer is not affected by a change in the name of the firm, or the accession of new partners or shareholders ; (r) and it is in general absolutely vested in him, so that the action upon all contracts entered into with the directors and trustees, *must* be brought in his name, and not in the names of those who are the actual parties to the contract. (s) But the power of entering into contracts on behalf of the company is not transferred to such treasurer, secretary, or public officer, but continues to reside with the directors in whose hands the management of the co-partnership is placed. The extent of the right of action of the public officer often depends upon the construction of private acts of parliament, the words of which are sometimes very large, vesting in him the right to sue upon all contracts in which the company is "concerned or *interested*," or which have been entered into "with any person in trust for the company," or "with any person for the use or benefit of the company."

By a deed of settlement executed by the subscribers to the capital of a joint stock company, each of the subscribers and proprietors of shares covenanted with certain trustees to make due payment of the instalments and calls on their several shares ; a private act enabled the company to sue in the name of its secretary upon any covenants which had been "entered into with the said company, or with any persons in trust for the said company, whether he is a proprietor of the said company or not ;" and it was held, that the act vested the right of action upon the covenant with the trustees in the secretary of the company, and that the latter might consequently maintain an action upon the deed against such of the shareholders as had neglected to pay up their calls." (t)

CORPORATIONS AGGREGATE.—"All the individual members of a corporation that have existed from the foundation thereof to the present time, or that shall hereafter exist, are but one person in the law ; as the river Thames is still the same river, though the parts which compose it are changing every instant." (u)

A corporation must either exist by prescription, by the king's charter, or by act of parliament. It must have a corporate name, by which alone it must sue and be sued, and perform all legal acts. To enable a corporation to sue upon a deed, the deed must be entered into with the body at large by its corporate name. If it is made with the members individually,

banking co-partnerships, 1 & 2 Vict. c. 97, and 5 & 6 Vict. c. 85.

(r) *Wilson v. Craven*, 8 M. & W. 584. *Whitmore v. Wilks*, 1 M. & M. 214.

(s) *Steward v. Greaves*, 10 M. & W. 719.

(t) *Skinner v. Lambert*, 4 M. & Gr. 477, 500 ; 5 Sc. N.R. 197, s.c. *Smith v. Goldsworthy*, 4 Ad.

& E. N. S. 461. As to the appointment of the public officer, see *Steward v. Dunn*, 12 M. & W. 655. The effect of this private legislation in some instances appears to be, to enable companies to sue upon deeds upon which they could never have been sued !

(u) Bl. Com. 468.

or with part of them, on behalf of the corporation, the action upon the contract must be brought by the parties with whom the contract is so made, and not by the corporation on whose behalf or for whose benefit it was made. (x)

If a covenant is made with a corporation by name, it is sufficient if the name and description inserted in the deed is "the same in substance with the true name, it need not be the same in words or syllables." (y)

Generally, when there is a corporation aggregate of many persons, such as a mayor and commonalty, dean and chapter, master of an hospital, and confreres, a contract made by the head alone without the body cannot operate as the contract of, or be put in suit by the corporation; and *vice versa*, a contract made by the body without the head cannot be regarded as the contract of the corporation; but if it have any effect at all, it can operate only as the contract of the individual parties executing the same. (z)

Although a corporation cannot in general bind itself to the performance of an executory contract, unless such contract has been entered into under the common seal, which is said to be the mouthpiece of the corporation, yet if a person has had the benefit of the fulfilment of a contract which could not have been enforced against the corporation whilst it remained executory, the law will raise an implied promise in its favour, upon which it may sue in its corporate character. (a)

Where, for example, a party has enjoyed all the benefit and advantage of a parol contract entered into with a corporation, he shall not be permitted to discharge himself from the ordinary liability, on the ground that the contract was not entered into under the common seal of the corporate body. A municipal corporation, therefore, may sue upon the ordinary implied promise in respect of money received by a third party, under a special contract with the corporation, which is void by reason of its not having been made under the common seal. It may maintain an action upon the ordinary implied promise for the use and occupation of tolls, when the tolls were not granted to the occupier under the common seal; (b) also for the use and occupation of houses and lands, the property of the corporation, where the tenant has actually occupied and taken and enjoyed the profits of the land under a lease void by reason of its not being granted

(x) Com. Dig. Franchises, F. 19, ante.

(y) *The King v Haughley*, 4 B. & Ad. 655.
Sussex Sidney College v. Davenport, 1 Wils. 184.

(z) Walford on parties to actions, 1105. Bro. Abr. tit. Corporation.

(a) *East London Water Company v. Bailey*,

4 Bing. 287. *Beverley v. Lincoln Gas Company*, 6 Ad. & E. 839; 1 N. & P. 883, s. c. *Mayor of Ludlow v. Charlton*, 6 M. & W. 821; ante, p. 85.

(b) *Mayor, &c. of Carmarthen v. Lewis*, 6 C. & P. 608.

under the common seal. (c) In these cases a benefit having been enjoyed by the defendant under the void contract, the law will imply a promise in favour of the corporation, upon which implied promise it may sue in its corporate character.

INCORPORATED joint stock companies.—The ancient maxim of law, too, that a corporation can only contract under the common seal, and in the corporate name, has in modern times been made subject to a very numerous class of exceptions. "Corporations have of late years been established sometimes by royal charter, more frequently by act of parliament, for the purpose of carrying on trading speculations; and where the nature of their constitution has been such as to render the drawing of bills, or the constant making of any particular sort of contracts necessary for the purposes of the corporation, there the court have held, that they would imply in those who are, according to the provisions of the charter or act of parliament, carrying on the corporation concerns, an authority to do those acts without which the corporation could not subsist, (d) and to do which it was expressly called into existence. The wants and necessities of a body incorporated for the purposes of trade, are of course materially different from those of an institution established for municipal purposes, and the government of towns and colleges; and if a trading corporation was unable to contract, in the ordinary course of its trade, except under the common seal, its usefulness for trading purposes would be destroyed, and it would be utterly unable to accomplish the object of its existence. It has been held, therefore, that a trading corporation may maintain actions for goods sold and delivered in the usual course of its trade, (e) and may sue upon executory contracts for the supply of goods, for the manufacture and supply of which the company was incorporated,—for the non-acceptance of goods sold,—and the non-delivery of goods purchased by the corporation. (f) It may also draw and accept bills of exchange and promissory notes. (g)

Rights of CORPORATORS inter se.—Bodies of persons who have received charters from the crown, under the statute 1 Vict. c. 73, sect. 29, which enables the crown, when it creates a corporation, to confer upon it any of the rights and incidents of the joint stock companies authorised to be created by that act, or who have been incorporated through the medium of a private act of parliament for trading purposes, partake in some degree

(c) *Dean and Chapter of Rochester v. Pierce*, 1 Camp. 466. *Mayor of Stafford v. Till*, 12 Moore, 260; 4 Bing. 77, s. c.; Vin. Abr. (CORPORATIONS) K. pl. 41.

(d) *Mayor of Ludlow v. Charlton*, 6 M. & W. 821.

(e) *City of London Gas Company v. Nicholls*, 2 C. & P. 365. *Church v. Imperial Gas Com-*

pany, 6 Ad. & E. 859.

(f) *Church v. Imperial Gas Company*, 6 Ad. & E. 859; 3 N. & P. 37, s. c. *East India Company v. Glover*, 1 Str. 612. *Gibson v. East India Company*, 5 Bing. N.C. 270, 271.

(g) *R. v. Bugg*, 3 P. Wms. 419. *Edie v. East India Company*, 2 Burr. 1216.

of the nature of a corporation, whilst in other respects they are governed by the ordinary law of partnership. When the rights and liabilities of the members *inter se* are not expressly regulated by statute, they will in most respects be the same as those of ordinary partners *inter se*. The aggregate existence of a corporation, and the individual existence of the members composing it, are indeed perfectly distinct; and there is no objection to an action by the corporation against one or more of its own members in a court of law, or by one or more of such members against the corporation itself, on implied promises in respect of benefits received, but this right, as between parties, who unite to the character of corporators, that of ordinary partners, must be restricted and modified by the ordinary law of partnership. Upon all covenants and express contracts, however, between the incorporated company on the one hand, and any one or more of its members on the other, for any claim or demand which can be ascertained and settled without going into the general accounts of the company, an action is maintainable.

Most corporations have the power of making bye-laws, imposing penalties on their own members, and regulating the right of action for the recovery of such penalties. (*h*)

Corporations remain always the same as to debts and rights, so that if an old corporation is incorporated by a new name, it may recover in its new name debts contracted with the old corporation. (*i*) A corporation revived by a new charter has all its rights revived and put in action, and is entitled to the credits of the old corporation, and may therefore sue on a bond given to the old corporation. (*k*)

Parish officers.—The right of action in respect of parish lands and hereditaments is regulated by act of parliament, and is vested either in the churchwardens and overseers of the poor of the parish for the time being, who are empowered to take and hold parish lands in the nature of a body corporate; (*l*) or in the guardians of parishes and unions under the recent act of 5 & 6 *Vict. c. 57*, whereby it is enacted that it shall be lawful for every board of guardians constituted under 4 & 5 *W. 4, c. 76*, "to accept, take, and hold, on behalf of the union or parish respectively for which they may act, any lands, buildings, goods, effects, or other property, as a corporation; and in all cases to sue and be sued in their corporate name."

(*h*) 2 Selw. N. P. 10th ed. 1158. *Graves v. Colby*, 9 Ad. & E. 356. *Dunston v. Imperial Gas Company*, 3 B. & Ad. 125. *Hill v. Manchester and Salford Water Company*, 5 B. & Ad. 875. *Carden v. General Cemetery Company*, 5 Bing. N. C. 257. *Feltmaker's Company v. Davis*, 1 B. & P. 101.

(*i*) *Mayor, &c. of Scarborough v. Butler*, 3

Lev. 237.

(*k*) *Mayor and Commonalty of Colchester v. Sea'ner*, 3 Burr. 1872, 1873.

(*l*) 59 Geo. 3, c. 12, s. 17. *Doe v. Harper*, 2 D. & R. 708. *Doe v. Terry*, 4 Ad. & E. 274. *Addy v. Woolley*, 3 Moore, 21; 8 Taunt. 691, s. c. *Pope v. Sale*, 5 M. & P. 336; 7 Bing. 477, s. c.

CHAPTER XI.

OF THE PLAINTIFFS IN ACTIONS EX CONTRACTU WHEN
THERE HAS BEEN A CHANGE OF INTEREST

BY

ASSIGNMENT AND BY NOVATION AND SUBSTITUTION.

SECTION I.—*Deeds.*—Real and personal contracts—Covenants running with the land—What covenants do, and what do not, run with the land—Covenants between grantor and grantee, and releasor and releasee, of an estate or interest in land—Covenants between landlord and tenant, lessee and reversioner—Covenants real annexed to reversionary estates—When the “assignees” must be named in the covenant—Existing breaches do not pass unless they are continuing breaches—Implied covenants running with the land—Rents and annuities—An annuity, issuing out of land assignable, but not an annuity issuing out of the personalty—Of the grantees’ right of election as between the land and the person, when both are charged—Discharge of the land by an election to charge the person—No right of action (other than the writ of annuity) transferable to the assignee of a freehold rent—Aliter if the rent be granted for a term of years only—The assignee of a rent granted for a term of years may have an action of debt for such rent—But no contract or covenant to secure the payment of the rent passes to such assignee with the rent—A covenant cannot run with a rent—Of the number of the plaintiffs when suing as assignees upon covenants running with the land—Joint tenants—Tenants in common—Of the assignment of personal covenants and bonds—Right of the assignee to sue in the name of the assignor—Forbearance by him a sufficient consideration for a promise to pay him the amount of the bond—Of the contracts under seal made assignable by statute—Bail bonds—Replevin bonds—Scotch bonds—Irish judgments—India bonds.

SECTION II.—*Simple Contracts.*—Simple contracts, as well as bonds and personal covenants, originally unassignable at common law—Relaxation of the rule in favour of bills of exchange—Promissory notes made assignable by statute—Bills of lading—Dock warrants—Right of the assignee of a simple contract debt to sue in the name of the assignor—Change of interest by **NOVATION** and **SUBSTITUTION**—Substitution of a new creditor in the place of the original creditor—Merger and extinguishment of the original debt necessary to the creation of the new debt—The joint consent and agreement of all parties necessary to the novation and substitution—An order by a creditor upon his debtor to pay a third party, presented by the latter to the debtor, and assented to him, operates by way of novation and substitution—The promise to pay such new creditor not a promise within the Statute of Frauds.

SECTION I.

CHANGE OF INTEREST BY ASSIGNMENT IN THE CASE OF DEEDS.

REAL and PERSONAL contracts.—If a contract under seal affecting the value or enjoyment of personal property be entered into either with the owner of the property to which it relates, or with a person who has some estate or interest therein, it is annexed to the estate which the covenantee has in the land, and the right to take advantage of it passes to the grantee or assignee of that estate. A contract of this description is consequently transferable at law; it passes from hand to hand with the interest in the realty to which it is annexed, and is called “a real contract,” or “covenant running with the land.” When a covenant does not touch or concern the realty, but is made respecting some matter of a merely personal nature, or is entered into with a person who has no estate in the land to which it refers, it is by the common law operative only between the immediate parties thereto, and their personal representatives after their decease; (a) and the right to take advantage of it by way of action cannot be extended by assignment to persons who are neither parties nor privies to the contract. But there are certain bonds presently mentioned and described which have been made assignable by express legislative enactment.

COVENANTS running with the land.—To enable a covenant to run with the land, it is not necessary that the covenantor should be possessed of any estate; he may be an entire stranger to the land, but the covenantee must be clothed with some transferable interest therein, to which the covenant can attach itself, for otherwise the covenant is a mere personal covenant, operative only between the immediate parties thereto, and their personal representatives after their decease.

The prior of a convent, for example, with the assent of his convent, covenanted for himself and his successors with the lord of a manor and his heirs, to sing in a chapel parcel of the manor; and it was held that the covenant was annexed to the manor, and that the grantee of the manor might sue the prior upon it; (b) but it was at the same time observed,

(a) “By the common law of this realm, no stranger to any covenant, action, or condition can take any advantage or benefit from the same by any means or ways in the law, but only such as

be parties or privies thereunto.” 32 Hen. 8, c. 34.

(b) Co. Litt. 385, a.

that "if such covenant were made to say divine service in the chapel of another, there the assignee shall not have an action of covenant, for the covenant in such case cannot be annexed to the chapel, because the chapel doth not belong to the covenantee." If, therefore, the covenantee is a mortgagor in fee, or a cestui que trust, the covenants are personal covenants, and do not run with the land, as the covenantee has no estate recognised by law in the land to which the covenants can be annexed. They can, therefore, only be enforced as between the original parties, and an action upon them must be brought in the name of the original covenantee, or his personal representatives. (c)

The assignee, too, must take the estate that the covenantee had in the land, and no other, for if he takes another and a different estate in the same land, he cannot sue upon the covenants. (d)

Covenants between GRANTOR and GRANTEE, RELEASOR and RELEASEE.—*Covenants* entered into by owners of real property, who convey away their entire interest in the land to the covenantee, are annexed to the estate so transferred, and pass to the assignee of that estate, so as to give him an action upon them against the covenantor, his real and personal representatives. Thus, if A., seized of lands in fee, conveys his estate and interest by deed to B., and covenants with B. to make further assurance, and B. then conveys to C., who conveys to D., D. may require A. to make further assurance to him of the lands according to the covenant, and on his refusal may maintain an action against him by the common law. (e) So, if two coparceners make partition of lands, and the one covenants with the other and her heirs to acquit her and her heirs of a certain suit issuing out of the lands, the assignee of the estate of the covenantee shall have an action upon the covenant; (f) and the same transfer of the right of action upon the covenant prevails, whether the interest conveyed by the covenantor be an estate of inheritance in the land, or a chattel real only. Thus, where the defendant, being possessed of a lease for twenty-one years, granted to him by Barclay, assigned his interest to Corp, and covenanted with Corp for the quiet enjoyment of the lands during the remainder of the term, and Corp then assigned the term to the plaintiff, who was subsequently evicted by Barclay, the original lessor, on account of a breach by the defendant of a covenant which had been entered into between him and Barclay, and which breach of covenant

(c) *Webb v. Russell*, 3 T. R. 393. *Whitton v. Peacock*, 2 Sc. 630; 2 Bing. N. S. 411, s. c.

(d) *Roach v. Wadham*, 6 East, 289, as to the right of action of assignees of the reversion, see

post, 299.

(e) *Middlemore v. Goodale*, 1 Roll. Ab. 521, k.; Cro. Car. 503, 505; Sir Wm. Jones, 406.

(f) Co. Litt. 385, a.

had caused a forfeiture of the lease, it was held, that the defendant's covenant for quiet enjoyment ran with his estate in the land so assigned by him, and that the plaintiff, as assignee of that estate, was entitled to maintain an action upon the covenant against the defendant, to recover damages for the eviction. (*g*) If a man, too, purports to grant lands to another in fee, by such conveyance as will pass a fee, and covenants that he is seized in fee, and hath good right to convey; and it subsequently appears, that at the time of the conveyance he was not seized in fee, and had not a right to convey, and no fee in the lands passed to the covenantee, yet the assignee of the covenantee who takes such estate and interest in the land as did pass to the covenantee, and who would have had the benefit of the covenant if it had been fulfilled, shall have an action upon it against the covenantor, to recover damages for the breach, (*h*) the intent of the law in all these cases being "to give the damages to the party grieved. (*i*)

Covenants between LANDLORD and TENANT, LESSEE and REVERSIONER.—But by far the most numerous class of covenants running with the land, are covenants entered into by parties standing in the relative positions of landlord and tenant, lessee and reversioner. If the owner of real property carves out of his estate a partial interest, such as a term of years, and enters into covenants affecting the value or enjoyment of the property by the lessee during the term, these covenants are annexed to the estate granted, they run with the land as long that estate continues, and the right of action upon them in case of breach vests in the assignee of the term. Such are covenants by the lessor to repair, or to grant estovers for the repair and maintenance of the demised tenements, or for burning within the house during the term; (*k*)—to cleanse and repair water-courses; (*l*)—to supply the demised premises with water; (*m*)—to acquit the land of certain suits and charges, (*n*)—also covenants for renewal; (*o*)—for quiet enjoyment; (*p*)—and all the usual covenants for title. (*q*) "And of these covenants assignees in deed or in law, and assignees of assignees *in infinitum*, shall take advantage; also assignees of executors or administrators, tenants by statute, or elegit, or after a sale upon a *fieri facias*, or a husband in right of his wife; any one of these, and

(*g*) *Noke v. Awdler*, Cro. Eliz. 373, 436.
Lewis v. Campbell, 3 Moore, 35; 3 B. & Ald.
 392. *Simpson v. Clayton*, 4 Bing. N. C. 758.

(*h*) *Jones v. King*, 4 M. & S. 188; Fitz. N. B.
 145.

(*i*) Co. Litt. 385, a.

(*k*) *Spencer's case*, 5 Co. 17, b.; Bacon's Abr.
 Covt. E. div. 5.

(*l*) *Holmes v. Buckley*, Prec. ch. 39; 1 Eq.
 Ca. Abr. 27, pl. 4.

(*m*) *Jourdain v. Wilson*, 4 B. & Ald. 266.

(*n*) 5 Rep. 18, a.

(*o*) *Roe v. Hayly*, 12 East, 464.

(*p*) *Noke v. Awdler*, Cro. Eliz. 436.

(*q*) *Campbell v. Lewis*, 3 B. & A. 392.

any other, that shall come lawfully to a term, unto which such a covenant is incident, albeit he be not named therein, yet may he take advantage thereof. (r) If, however, one having no estate at all in the premises, grants a lease to A., who assigns to B. with a covenant for quiet enjoyment, and B. assigns over to C., no action lies for C. against A., because nothing passed but by estoppel; there is no estate in the land to which the covenants can be annexed, inasmuch as lessee by estoppel cannot assign anything over. C. therefore cannot be an assignee so as to support an action upon the covenant. (s)

COVENANTS REAL *annexed to REVERSIONARY ESTATES*.—Covenants, however, were held at common law to run with the estate of the lessee only, not with the estate of the reversioner, consequently, although the assignee of the lessee was held to be entitled to sue upon them, yet the assignee of the reversion had no such remedy, and could not maintain an action upon any express covenants made between the lessor and the lessee in respect of the land. Thus, if the owner in fee made a lease, and obtained from the lessee covenants to repair, to manure the lands, or to cultivate them in a particular manner, &c. &c., and then assigned his reversion, the assignee had no title to sue upon these express covenants. This inconvenience led to the passing of the act of 32 Hen. 8, c. 34, which places the assignee of the reversion, and the lessee and his assignees, upon the same footing with respect to each other as that on which the lessor, and the lessee and his assignees, previously stood at common law, and gives them the same mutual remedies against one another, as those previously existing between the lessor and the lessee, and his assignees. The statute extends to the assignee of the reversion of copyhold tenements, (t) and to the assignee of the reversion of a lease for life as well as for years (u)—to the assignee of part of the reversion in all the land, (x) and to the assignee of the reversion of part of the land; (y) and where tenant for life makes a lease in pursuance of a leasing power, the remainder-man is considered to be an assignee of the reversion within the statute. (z)

But to enable the assignee of the reversion to avail himself of the statute, and to maintain an action upon covenants entered into between the lessor and the lessee, it was held, that there must be what is technically termed a *privity of estate* between him and the party he sought to charge

(r) Shep. Touchst. ch. 7.

(s) *Nokes v. Awder*, Cro. Eliz. 373, 436; Moore, 419, s. c.; nom. *Awder v. Nokes*.

(t) *Glover v. Cope*, 3 Lev. 326; Carth. 205; Skinner, 305, s. c.

(u) *Matures v. Westwood*, Cro. Eliz. 617. *Leves v. Ridge*, id. 863.

(x) Co. Litt. 215, a.

(y) *Trynam v. Pickard*, 2 B. & Ald. 105.

(z) *Isherwood v. Oldknow*, 3 M. & S. 382.

with the performance of the covenants, i. e. the assignee of the reversion and the party sought to be charged must have been respectively possessed of the estates which the covenantor and the covenantee had in the land at the time the covenants were entered into; for if they were possessed of different interests in the same lands, the assignee could not maintain an action upon them. Thus, if the assignee did not continue to be seized or possessed of the reversion which the lessor had in the lands at the time the covenant was made, but had taken another and a different reversion in the same lands, his right of action upon the covenants was altogether gone. Thus, if a lessee for a term of ninety-nine years created out of his estate an under-lease for eleven years, leaving in himself the immediate reversion for the remainder of the term, and obtained from the under lessee covenants to pay rent and repair, and then assigned his immediate reversion for the term to A., who subsequently acquired the ultimate *reversion in fee*, wherein the reversion for the term became *merged*, it was held, that A., after this merger, could no longer maintain an action upon the covenants, as the estate to which they were annexed, *the reversion for the term* immediately expectant upon the determination of the under-lease no longer existed, the assignee was no longer in possession of the reversion which the covenantee had in the land, the privity of estate was gone, and with it the right of action upon the covenants. (y) Now, however, by the act of 7 & 8 Vict. c. 76, s. 12, it is enacted, with respect to all estates and covenants created and made subsequently to the 31st of December, 1844, "that where the reversion of any land expectant on a lease shall be merged in any remainder, or other reversion or estate, the person entitled to the estate into which such reversion shall have merged, his heirs, executors, administrators, successors and assigns, shall have and enjoy the like advantage, remedy, and benefit against the lessee, his heirs, successors, executors, administrators and assigns, for non-payment of the rent, or for doing of waste, or other forfeiture, or for not performing conditions, covenants, or agreements contained and expressed in his lease, demise, or grant, against the lessee, farmer, or grantee, his heirs, successors, executors, administrators and assigns, as the person who would for the time being have been entitled to the mesne reversion, which shall have merged, would or might have had and enjoyed if such reversion had not been merged."

The assignee, however, must in all cases be the assignee of the legal

(y) *Webb v. Russell*, 3 T. R. 393. *Wootton v. Steffenoni*, 12 M. & W. 129.

estate in reversion, otherwise he has no title to sue upon the covenants ; for if the lessor is clothed only with an equitable interest, there is no such estate as will carry the covenants to the assignee ; they are therefore personal covenants, and cannot run with the land. (*z*)

The covenants, too, must in all cases be made not merely *concerning* the land—the performance or non performance of them must affect the nature, quality, or value of the thing demised, and its mode of enjoyment, otherwise they do not run with the land ; as where the lessee, in a lease of land with liberty to make a water-course and erect a mill, covenanted, for himself and his assigns, not to hire persons to work in the mill who were settled in other parishes without a parish certificate ; and it was held, that this covenant did not run with the land, as it did not immediately affect the nature of the property demised whether the mills were worked by persons of one parish or of another, nor in any degree vary the nature of the property, or the value of it at the end of the term. (*a*) So, also, a covenant by the lessee of a house to account and pay so much for every tun of wine sold in the house is a collateral and mere personal covenant, and goes not with the land or the reversion by assignment. (*b*)

But all covenants relating to the cultivation of the demised premises, (*c*) —to pay rent, or render suits and services, (*d*) —to dwell in and upon the demised farm and lands, (*e*) —to insure premises situate within the weekly bills of mortality, (*f*) not to exercise thereon certain specified trades, (*g*) have been held to run with the land, as also covenants to repair, and covenants to discharge the land from all taxes, burdens, &c. (*h*)

The lessee covenanted to grind at the lessor's mill all the corn that should grow on the demised lands, and it was held that this was a covenant which ran with the land, and passed to the assignee of the reversion as long as the ownership of the lands and the mill remained in the same individual. (*i*)

A lessor demised a house, excepting two rooms, and a free passage thereto, and it was held that the exception amounted to an express covenant or grant of a free passage, or right of way, by the lessee, and would

(*a*) *Whitton v. Peacock*, 2 Sc. 630 ; 2 Bing. N. S. 411, s. c.

(*a*) *Mayor of Congleton v. Pattison*, 10 East, 129.

(*b*) Godb. 140. And see *Canham v. Rust*, 8 Taunt. 227 ; 3 Moore, 164, s. c. *Walsh v. Fussell*, 3 M. & P. 455 ; 6 Bing. 163, s. c. *Hartley v. Pehall*, Peake, 178.

(*c*) *Cockson v. Cock*, Cro. Jac. 125.

(*d*) *Stevenson v. Lambard*, 2 East, 575. *Vyvyan v. Arthur*, 1 B. & C. 410 ; 2 D. & R. 670.

(*e*) *Tatem v. Chaplin*, 2 H. Bl. 133.

(*f*) 14 Geo. 3, c. 78, s. 83. *Vernon v. Smith*, 5 B. & Ald. 1.

(*g*) *Doe dem. Bish v. Keeling*, 1 M. & S. 95.

(*h*) *Dean and Chapter of Windsor's case*, 1 Rep. 24, b.

(*i*) *Vyvyan v. Arthur*, 1 B. & C. 415. 2 D. & R.

bind the assignees of the term. (*k*) If a man demises land for a long term of years, and the lessee covenants not to erect buildings on the land so demised to obstruct the lessor's light, or destroy his prospect, or impede the air, this is a covenant which runs with the land, and binds all the assignees of the term. (*l*)

When the ASSIGNEES must be named in the COVENANT.—If the covenants relate to a thing in existence, parcel of the demise, the benefit of them passes to the assignee, although not named in the covenant; where, however, they relate to a thing not in existence, and not parcel of the demise, but which, when it comes into existence, will be annexed to the land, then the interest in the covenant passes to the assignees only, when they are expressly named therein. If the lessee covenants with the lessor and his assigns to build a wall, or to erect a smelting mill (*m*) on some part of the demised land, then, although the covenant doth extend to a thing to be newly made, yet, as it is to be made upon the thing demised, the assignee shall take the benefit of it. But if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the covenants shall not extend to the assignee, although he is named therein; "as, if the lessee covenants, for himself and his assigns, to build a house upon land of the lessor, which is no parcel of the demise," (*n*) then the assignee shall not have the benefit of the covenant.

EXISTING BREACHES *do not pass unless they are* CONTINUING BREACHES. *Lastly*, the covenant is transferred with the land by assignment, as appurtenant to the estate, but not an existing breach of it. The right of action in respect of a breach previously committed being what is technically termed a *chose in action*, which cannot, as we shall presently see, be transferred, remains with the assignor, in whose name alone can the action be brought. Thus, where the defendant, being seized of lands in fee, made a lease for life, rendering rent, and afterwards acknowledged a statute, and after that assigned his reversion, and covenanted with the assignee that the land should be discharged, within two years, of all statutes, charges, and incumbrances, excepting the estate for life; and the statute was extended, and thereupon the reversion and the rent were extended, after which the reversion was assigned to the plaintiff, who, for the not discharging of this statute, brought an action upon the covenant; it was held, on de-

(*k*) *Coles's case*, 1 Salk. 196. *Bush v. Calie*,
1 Show. 389; Carth. 232, s. c.

(*l*) *Bachelor v. Gage*, Cro. Car. 188.

(*m*) *Sampson v. Easterby*, 9 B. & C. 505; 4

M. & R. 422, s. c.; 6 Bing. 645; 4 M. & P. 601,
in error.

(*n*) *Spencer's case*, 5 Co. 16, a.

murrer, that as the covenant was broken before the assignment, (the land being then in extent) and so a thing in action which could not be transferred, the plaintiff had no title to maintain his action. (*o*) So, where rent covenanted to be paid was in arrear, and an action was brought to which the defendant pleaded that, after the arrearages incurred, and before action brought, the plaintiff had assigned his reversion, it was held, on demurrer, that the right to the arrearages was "a right vested in the plaintiff before the assignment, the which he should not lose by the assignment;" (*p*) for although the covenant had been transferred with the estate to the assignee, yet it was not so with respect to the right of action which had previously accrued.

Continuing breaches.—But as regards what are termed *continuing* breaches, the assignee may maintain an action as soon as he becomes seized or possessed of the estate to which the covenant running with the land is annexed; as in the case of the breach of a covenant to repair, where, although the covenant has been broken, and the premises are left out of repair at the time of the assignment, and come so out of repair to the hands of the assignee, yet if they remain so afterwards, during the continuance of the term, the covenant is then broken again in the time of the assignee, there being a constant repetition of the breach, as long as the acts to be done upon the land remain unperformed. (*q*) But if the covenant be broken, and the lease expires, and then the premises are assigned, the assignee can maintain no action upon the covenant, for the lease being at an end, there is an end of the covenant, which has been broken once for all, so that the ultimate damage has accrued before the time of the assignee. (*r*)

The breach of a covenant for title is in the nature of a continuing breach, as long as the party entitled to the benefit of the covenant is in possession of the land under a defective title; for although if one doth covenant that "he is lawfully seized in fee, or that he hath a good estate, and hath *not*, the covenant is broken as soon as it is made;" (*s*) yet, as long as the assignee does not enjoy the land under a good title, "there is a continuing breach; for it is not like a covenant to do an act of solitary performance, which, not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require. (*t*)

(*o*) *Lewes v. Ridge*, Cro. Eliz. 863. *Canham v. Rust*, 8 Taunt. 227; 2 Moore, 164, s. c.

(*p*) Anon. Skin. 367. *Midgley v. Lovelace*, Carth. 289; 12 Mo. 46, s. c.

(*q*) *Mascal's case*, Moore, 242; 1 Leon. 62,

s. c. *Vivian v. Campion*, 1 Salk. 141; Holt, 178; Lord Raym. 1125.

(*r*) See post ch. 14, sec. 1.

(*s*) Shep. Touch. 170.

(*t*) *Kingdon v. Nottle*, 4 M. & S. 53.

Implied covenants arising from the word demise in a lease, under seal, run with the estate, or term of years created in the land, so that the assignee of the lessee, if evicted, shall have an action thereon against the original lessor. (u) But the law raises no implied covenant from a person who has not the legal estate in the land, as from a mortgagor who has joined a mortgagee in making a lease, (x) and from whom no legal interest passes.

RENTS AND ANNUITIES.

The grant of a sum of money to issue out of the land of the grantor, and to be paid at fixed consecutive periods, for a term of years for life, or in fee, is in strictness of law a RENT. When it is granted to be paid by the grantor and his representatives only, then it is an annuity. (y) As, however, both the land and the personalty are generally made liable to the payment of the money, the term annuity has been indiscriminately used to signify both the charge on the person and the charge on the land, which, as the rights and properties by law incident to the one and the other are altogether different, is apt to create some confusion and misconception concerning them. (z)

A rent or sum of money, issuing out of land, is a direct interest in realty in possession, (a) and is assignable by the common law; (b) but an annuity or sum of money granted to be paid by the grantor and his representatives only, issuing therefore out of the personalty, or, as it has been termed, "the coffers of the grantor," and not charged upon or issuing out of the land, is a mere personal contract or *chose in action*, and cannot therefore, as we shall presently see, be assigned so as to give the assignee a right of action for it in his own name. (c)

When both the person and the land of the grantor were made liable to the payment of the money, (d) the grantee had an election either to bring a writ of annuity, and charging the person to make the grant personally only, or by distraining on the land to make it real, but he could not have both the one and the other, for the writ of annuity having been

(u) *Spencer's case*, 5 Co. 16, a. Platt on covenants, 40. *Noke's case*, 4 Co. 80, b.

(x) *Smith v. Pokington*, 1 C. & J. 445.

(y) Co. Litt. 144 (b).

(z) Doctor & Student, Dial. 1, c. 30; Annuity & Rent Charge; Bacon's Abr.; Vin. Abr., Annuity, B. *Randal v. Writtle*, 2 Lev. 87. *Weeks v. Peach*, 2 Salk. 577; Co. Litt. 162, (a). *Aubin v. Daly*, 4 B. & Ald. 59.

(a) *Fopham, J., Ards v. Watkins*, Cro. Eliz.

637, 638.

(b) Com. Dig. Asst. (a.); Co. Litt. 144 (a); 144 (b.); 292 (b.)

(c) *Hargrave's note*, Co. Litt. 144 (b). *Gerrard v. Boden*, Hetl. 80, is no authority. See *Baker v. Brook*, Dy. 65 (a), of which it is a literal translation, the names of the counsel and judges being changed. *Crasb v. D'Aeth*, 7 T. R. 670 (b).

(d) Bacon's Abr. Rent. (K.) 2.

once brought, the land was thenceforth discharged. (*e*) So long, however, as the election had not been made, the rent passed with all its legal rights and incidents to the assignee, who, standing in the shoes of the grantee, had the same right of election as between the land and the person, and might, by suing out a writ of annuity, release the land, and turn the charge entirely on the person of the grantor. (*f*)

As, however, no personal action other than the writ of annuity could be maintained in respect of a rent granted for life, or in fee, so long as the estate of freehold had continuance, (*g*) (there being remedies of a higher and more summary nature by way of distress and assise,) (*h*) no right of *action* could be transferred to the assignee of a freehold rent; but when the rent was granted for a term of years, then as an action of debt might, it should seem, be maintained for the recovery of such rent, (*i*) such right of action would pass to the assignee as incident to the interest in the land granted. Thus it has been held that rent reserved on a lease for years may be severed from the reversion, and assigned so as to give the assignee an action of debt for the arrears. (*k*)

"When rent is severed from the reversion, it is but in nature of an annuity, and an annuity or rent only, *are* grantable over, because they are things of continuance and are not *personal*." (*l*)

Certain premises were demised for a term of years by an indenture of lease, containing covenants by the lessee for the payment of rent; subsequently the rent and the counterpart of the lease, and the benefit of the covenants, were assigned; and it was held that the assignee might maintain debt against the lessee for the recovery of the rent. (*m*) But although the remedy by action of debt for the recovery of the specific sum payable out of the land passes to the assignee as incident to the direct interest in the land assigned, yet nothing in the shape of contract passes by the assignment, the assignee has no remedy upon any contract or stipulation made concerning the land, or for better securing the payment of the rent, he can maintain no action of COVENANT, for a covenant cannot run with a RENT. (*n*) Thus, where the defendant covenanted with

(*e*) Co. Litt. 144, b.

(*f*) Co. Litt. 144 (b), 292, b. *Baker v. Brook*, Dy. 65, a.

(*g*) *Webb v. Jiggs*, 4 M. & S. 113. *Kelly v. Clubb*, 6 Moore, 335. *Parke, B., Braithwaite v. Skinner*, 5 M. & W. 323. *Randall v. Rigby*, 4 M. & W. 135.

(*h*) 4 Geo. 2, c. 28, s. 5. *Bacon's Abr. Rent* (K.)

(*i*) *Brendloss v. Philips*, Cro. Eliz. 895; *Gilbert's Rents*, 93. *Browne v. Pendlebury*,

Cro. Eliz. 268.

(*k*) *Newcomb v. Harvey*, Carth. 161. *Wilston v. Pinkney*, Ventr. 242, 272; 2 Lev. 80, s. c. *Ards v. Watkins*, Cro. Eliz. 637. *Loyd v. Langford*, 2 Mod. 175.

(*l*) *Popham, J., Ardes v. Watkins*, Cro. Eliz. 651.

(*m*) *Allen v. Bryan*, 5 B. & C. 512.

(*n*) *Milnes v. Branch*, 5 M. & S. 411. *Randall v. Rigby*, 4 M. & W. 135. *Boscawin v. Cook*, 1 Mod. 223. *Cook v. Herle*, 2 Mod. 138.

Barnsley to pay him, his heirs, and assigns, a certain rent to be issuing out of the land of the defendant, and covenanted to build one or more messuages on the land for better securing the payment of the rent; it was held that this covenant was a mere personal covenant, operative only between the immediate parties thereto and their privies, and that the assignee of the rent had no title to maintain an action upon the covenant, either for the non-payment of the rent, or for not building the messuages.

Of the number of the plaintiffs when there has been a change of interest by assignment.

JOINT TENANTS AND TENANTS IN COMMON.—If the assignees have a joint interest in, and are jointly entitled to the estate to which the covenants are annexed, they must, as we have already seen, bring a joint action upon the covenants, and separate actions when they have several estates, and a separate and distinct damage has accrued to each. Joint tenants, therefore, must sue jointly in respect of their joint estate; but tenants in common may, it seems, when a reversion expectant upon the determination of a lease for years, upon which a rent has been reserved, comes to them, join in an action of debt for the rent, or sever at their election. (o) But upon covenants running with the land, and coming to parties either as tenants in common or joint tenants, the action must be joint or several, according as a joint duty arises in favour of all, or separate duties to each. (p)

A lease of certain houses was granted to Buckley, who covenanted with the lessor to repair them, and afterwards one moiety of the reversion, expectant upon the determination of the lease, was granted to Kitchen, and the other moiety to Knight, and the two brought a joint action against Buckley for a breach of his covenant; whereupon it was objected that the plaintiffs, being tenants in common, ought not to have joined in an action for repairs which concerns the inheritance, but ought to have brought several actions, according to their several estates; but the court held that they were properly joined. (q)

The tenant of a leasehold estate for ninety-nine years, held on renewable lives, on the other hand, having under-let part of the premises on a building lease for sixty-five years and one quarter, entered into a covenant

(o) Holt, C. J., *Martin v. Crompe*, 1 Lord Raym. 341. *Midgeley v. Lovelace*, Carth. 289. *Harrison v. Barnby*, 5 T. B. 246. *Cutting v. Derby*, 2 W. Bl. 1077. *Johnson v. Wilson*,

Willes, 254; 7 Mod. 347, s. c.

(p) Ante, 267—271.

(q) *Kitchen v. Buckley*, 1 Lev. 109; Litt. sec. 311—316.

to do all things necessary to obtain a renewal on fresh lives, when any of the persons on whose lives the estate was holden should die, so that the lessees might hold and enjoy all the demised premises for the full term. The lessees entered, and afterwards assigned their interest; and in the course of time, after divers mesne assignments, five-sixths of the premises became vested in Simpson, and the remaining sixth in another person, as tenants in common. Afterwards the covenant was broken, and all the persons on whose lives the lands were holden died; whereupon the term ceased, and Simpson and his co-tenant in common were deprived of the property. Simpson then brought an action to recover his proportion of the damages, when it was contended that the covenant was not apportionable, and that the owner of the remaining sixth part, should have joined in the action; but the court held, that as Gibson and the latter had separate and distinct interests in the term as tenants in common, the damages were in their nature several, and might well be apportioned by a jury according to the value of the share of each, and that the plaintiff therefore had a right to maintain a separate action in respect of the separate damage sustained by him. (*r*)

If the entire reversion is divided among several persons, each possessing a distinct interest in his particular portion, and a breach of covenant takes place, affecting the value of the entire reversion, each of the parties interested should bring a separate action, and the damages will be assessed and apportioned according to their several shares and interests in the subject matter of the covenant.

Personal covenants.—We have before seen that a covenant cannot run with a RENT; neither can it run with goods, or any personal, perishable chattel, so as to give the assignee a right of action upon it in his own name.

Holmes, the owner of a brig, for example, by a charter-party of affreightment, let the brig for a voyage to Minorca to one Foulder, of London, who covenanted with Holmes to pay freight and demurrage to him or his order, and the brig during the voyage was sold, it was held that the covenant was not transferred by the assignment of the property in the ship, in the same manner as certain covenants are said to run with the land, but that the legal interest therein still remained with Holmes, the late owner, who was the only party entitled to maintain an action upon it. (*s*)

Whenever a covenant in a contract under seal is not annexed to a transferable estate in land, it is a mere personal covenant, which cannot, as has

(*r*) *Simpson v. Clayton*, 4 Bing. N. C. 758. *v. Vanzeller*, 4 Ad. & E. N. S. 295. *Spencer's*
 (*s*) *Splidt v. Bowles*, 10 East, 279. *Sanders* case, 5 Co. 16, a.; Com. Dig., Cov. C. 3.

already been observed, be assigned so as to give the assignee a right of action thereon in his own name.

The common law in times past discountenanced the assignment of all rights and causes of action, as tending to increase maintenance and litigation, (t) and would not consequently suffer the right to the fulfilment of a contract of a personal nature to be transferred from hand to hand. But in these days the ancient rule of law has evaporated to a mere shadow. It no longer prevents the assignee from suing, but regulates merely the form of his action. He cannot sue in his own name, but he is permitted to bring his action, and to recover in the name of the original assignor, the party with whom the contract was entered into. Thus, if a bond be assigned, the assignee cannot maintain an action upon it in his own name, but he can sue and recover the money in the name of the obligee; (u) and the courts will set aside a release given by the latter, after notice to the obligor of the assignment, and prevent him from fraudulently interfering to defeat the action. (x) If a ship-owner charters his vessel for a voyage by a charter-party of affreightment under seal, and before the vessel sails, sells the ship, and assigns the charter-party to the purchaser, the latter cannot, as we have before seen, bring an action thereon in his own name, but he can sue and recover the freight covenanted to be paid in the name of the assignor. (y) In modern times, too, the legislature, yielding to the wants and necessities of mankind, has sanctioned the assignment of certain bonds and deeds, and authorised the assignees to sue upon them in their own names. Bail-bonds, for example, have been made assignable to the plaintiff in an action, or his attorney, by indorsement under the hand and seal of the sheriff, or other officer, who has taken the bail; and the assignment may be made either by the high sheriff himself, or by the under-sheriff in his name, or by a clerk in the under-sheriff's office. (z) Replevin bonds, also, are assignable in the same manner by the sheriff, or any officer who has power to grant replevins, "to the avowant or person making conuizance" in an action of replevin; (a) and an action has accordingly been held to lie at the suit of an assignee upon a bond taken and assigned by one of the sheriffs of London alone. (b) If the action be brought by the tenant against both the landlord and the bailiff who has levied the distress, so that there is both an avowant *and* a person making

(t) Co. Lit. 232, b. n. 1; 265, a. n. 1, ed. 1832.
Master v. Miller, 4 T. R. 340.

(u) *Legh v. Legh*, 1 B. & P. 447. *Heath v. Hall*, 4 Taunt. 328. *Phillips v. Clagett*, 11 M. & W. 84.

(x) *Alner v. George*, 1 Camp. 392.

(y) *Morrison v. Parsons*, 2 Taunt. 407.

(z) 4 Ann. c. 16, s. 20. Tidd's Pr. ch. 13.

(a) 11 Geo. 2, c. 19, s. 23. *Middleton v. Sandford*, 4 Campb. 36.

(b) *Thompson v. Farden*, 1 M. & Gr. 535.

conuzance upon the record, then the bond may be assigned to both, so as to give them a joint right of action upon it; (c) or the avowant, as the party substantially interested, may take an assignment to himself alone, and bring a separate action upon the bond; (d) but if the action be brought against the bailiff alone, then he, being the only party on the record, and entitled to a return of the distress if he maintain his conuzance, is the only person who can take an assignment of the bond, and maintain an action upon it, and the only person who can sue the sheriff for taking insufficient pledges. (e) If the tenant neglects to appear and prosecute his suit in the county court, so that the bailiff has no opportunity of making conuzance, he may nevertheless take an assignment of the bond, and maintain an action thereon. (f)

The assignee of a Scotch bond, which is a negotiable instrument in Scotland, may maintain an action of *assumpsit* in this country against the obligor upon the implied promise raised by the indorsement and assignment to him of the bond, (g) and as the assignment of judgments by confession is authorised by act of parliament in Ireland, the assignee of such a judgment may maintain an action in this country upon it in his own name. (h)

India bonds also are now made assignable by statute. (i)

Although the assignee of a personal contract cannot maintain an action in his own name thereon, yet the assignment thereof may be the foundation of a new contract between him and the debtor enabling him to recover the original demand. As the assignment, for example, gives the assignee a claim in equity and a power of suing in the name of the original party to the contract in a court of law, any promise by the person liable upon the contract, to pay the demand or satisfy the claim, in consideration that the assignee will give him time for payment, or forbear for a particular period to sue him, will enable the assignee to maintain an action upon such new contract or promise. Thus, forbearance for a given time, on the part of the assignee of a bond, to sue the obligors at their instance, is a sufficient consideration for a promise by the obligors to pay the assignee at the expiration of that time. (k)

(c) *Phillips v. Price*, 3 M. & S. 180.

(d) *Archer v. Dudley*, 1 B. & P. 381, n.

(e) *Page v. Eamer*, 1 B. & P. 378.

(f) *Dias v. Freeman*, 5 T. R. 195.

(g) *Innes v. Dunlop*, 8 T. R. 595.

(h) 9 Geo. 2. 25 Geo. 2. *O'Callaghan v.*

Marchioness Thomond, 3 Taunt. 82.

(i) 51 Geo. 3, c. 64. *Glyn v. Baker*, 13 East, 509.

(k) *Morton v. Burn*, 7 Ad. & E. 19. *Reynolds v. Prosser*, Hardr. 71. *Forth v. Stanton*, 1 Saund. 210, n. 1, n. a.

SECTION II.

CHANGE OF INTEREST BY ASSIGNMENT, AND BY NOVATION AND SUBSTITUTION, IN THE CASE OF SIMPLE CONTRACTS.

The rule of the common law prohibiting the assignment of all *choses in action*, naturally embraces all simple contracts. If a person in insolvent circumstances assigns his book-debts to trustees for the benefit of his creditors, the assignees will be non-suited if they bring actions in their own names, but they may sue and recover the debts in the name of the insolvent, the assignor. (a) But the rule, so far as it affects simple contracts, has been made subject to divers exceptions, which have been allowed to grow up and become established by the common law; and others have been introduced and established by act of parliament, to meet the wants and exigencies of society.

BILLS OF EXCHANGE and PROMISSORY NOTES.—As trade and commerce increased, and the growing necessities of mankind required a freer transfer and circulation of property, the mercantile custom of transferring bills of exchange from hand to hand, gradually received the sanction and approval of the courts of common law, and the holders of these securities were permitted to bring actions upon them in their own names.

Any absolute unconditional order in writing from one man to another, duly stamped, directing the drawee, or person to whom the order is addressed, to pay a sum of money to the drawer and to his "order," or to some third party, and to the order of such third party, is a negotiable security, or bill of exchange, transferable from one person to another, so as to enable the transferee to sue in his own name upon such bill, provided the assignment has been made by the payee in conformity with mercantile custom, as settled and established by law. If the written order duly stamped is made payable to "bearer," it is transferable by mere delivery; (b) so that any *bonâ fide* holder or bearer of the instrument is entitled to maintain an action upon it in his own name as soon as it becomes payable. If, on the other hand, it is drawn "payable to order," it can only be assigned by indorsement from the payee. "Although the

(a) *Brandt v. Heatig*, 2 Moore, 184. *Mann v. Sheriff*, 2 B. & P. 356. *Pickford v. Ewington*, 4 Dowl. P. C. 453.

(b) *Gibson v. Minet*, 1 H. Bl. 606. *Peacock v. Rhodes*, 2 Doug. 636. *Wookey v. Pole*, 4 B. & Ald. 9, 21.

holder may have paid the full value of the bill, and although it be bargained, sold, assigned, and conveyed by every form of conveyance which courts of law and equity in this country have recognized," yet if there be no indorsement, the assignee of the bill has no right of action upon the instrument in his own name. The indorsement is sometimes an indorsement in full, so called, because the indorser not only writes his own name on the bill, but expresses therein in whose favour the indorsement is made, as "pay the contents to Mr. A. B.;" and sometimes an indorsement in blank, when the name of the indorser himself alone appears upon the instrument, no mention being made of the indorsee. In the first case the indorsee can only transfer his interest in the bill by his own indorsement in writing, but in the second he can transfer it by delivery only; so that, any subsequent *bonâ fide* holder may treat the first indorsement in blank, as a direct indorsement to himself, and bring an action in his own name upon the instrument, and this he may do notwithstanding subsequent indorsements in full have been made thereon. Any number of persons too, whether partners or not, may, it seems, join in suing upon a bill indorsed in blank. (c)

PROMISSORY NOTES are by statute (d) placed upon the same footing, and made transferable in the same manner as bills of exchange.

Any promise or engagement in writing, duly stamped, to pay a specified sum at a time limited, or on demand, or at sight, to a person named, and "to his order," is a promissory note within the meaning of the statute of Anne, and is negotiable and transferable, like a bill of exchange. But it must in all cases, like the latter description of security, be drawn or made, for the payment of money absolutely and unconditionally. If the payment is to depend upon the contingency or the happening of any uncertain event; if it is to be made out of a particular fund which may or not be available, the instrument is not negotiable, and cannot be transferred by indorsement or in any other manner. (e) Any words, indeed, upon the face of the note qualifying the promise, and rendering the ultimate liability to pay the money uncertain, will deprive the note of negotiability and render it a mere agreement. (f)

(c) *Attwood v. Rattenbury*, 6 Moore, 579. *Ord v. Portal*, 3 Campb. 239. *Lowe v. Copestake*, 3 C. & P. 800.

(d) 3 & 4 Ann. cap. 9, s. 1; 7 Ann. c. 25, s. 3. This act was passed in consequence of the refusal of the courts of common law to recognise the negotiability of notes. Lord Holt resolutely set his face against the mercantile custom of transferring such securities, saying, that "it pro-

ceeded from the obstinacy and opinionativeness of merchants, who were endeavouring to set the law of Lombard Street above the law of Westminster Hall." *Clerk v. Martin*, 2 Raym. 757.

(e) *Morgan v. Jones*, 1 Cr. & J. 162; 1 Tyr. 21, s. c. *Blanckhagen v. Blundell*, 2 B. & A. 417. *Hancock v. Hodson*, 12 Moore, 504; 4 Bing. 296, s. c.

(f) *Robins v. May*, 11 Ad. & E. 213.

No precise form of words is necessary, as we have seen, to create either a bill of exchange or a promissory note. Any order or promise for the payment of money absolutely and unconditionally "to order" or "to bearer," put into writing and duly stamped, will constitute either the one or the other description of security, and if it appears doubtful which of the two it was intended to be, it may be, treated either as the one, or the other, at the election of the payee. (g) A promissory note need not contain an express promise in terms upon the face of it; it is sufficient if the promise appears by necessary inference from the words used. (h) A note in writing, for example, to the following effect, "I promise to account with A. B. or order, for 50*l.* value received by me," has been held a promissory note negotiable within the statute of Anne. (i) And its negotiability is not destroyed by an acknowledgment upon the face of it of a deposit of title deeds as a collateral security for the payment of the money. (k)

A promissory note payable by instalments, subject to a condition, that on default being made in payment of the first instalment, the whole amount should become immediately payable, is not a note payable upon a contingency, but is, if made payable to order, assignable and indorsable under the statute of Anne. (l) But it is essential in all cases to the negotiability of a bill or note, that it be drawn payable "to bearer" or "to order." (m) If those words are omitted, or the money is made payable upon the happening of some uncertain event, the instrument is not transferable, and the action upon it must be brought in the name of the original promisee or payee. But if the words "or order" "or bearer" have been omitted *by mistake*, they may, after the bill or note has been signed, be inserted with the consent of all parties in pursuance of an original intention to make the instrument negotiable. (n)

The negotiability of a bill or note may be limited and restrained by the express terms of the indorsement. Hence there are restrictive, conditional, and qualified indorsements; but it would far exceed the intended limits of this present treatise to discuss the varied learning connected with bills and notes, and the reader therefore is referred to the numerous excellent works extant upon the subject. It must be observed, however, in conclusion, that if the bill or note be for less than 5*l.*, the indorsement

(g) *Miller v. Thompson*, 4 Sc. N. B. 204.

(h) *Ib.*

(i) *Norris v. Lee, Ltd. Raym.* 1396; 1 Str. 629; 8 Mod. 362, s. c.

(k) *Wise v. Charlton*, 4 Ad. & E. 786.

(l) *Oridge v. Sherborne*, 11 M. & W. 380.

Carlton v. Kerwaly, 12 M. & W. 139. *Wain v. Bailey*, 10 Ad. & E. 616.

(m) *Plimley v. Westley*, 2 Sc. 423; 2 Bing. N. C. 251.

(n) *Kershaw v. Cox*, 3 Esp. 246.

must mention the name and place of abode of the indorsee, bear date at or before the time of making it, and be attested by a subscribing witness. (*o*)

By the further judicial sanction of the custom of merchants dividend warrants issued by the Bank of England for the payment of dividends on stock in the public funds are transferable from hand to hand without indorsement, so as to entitle the *bonâ fide* holder to receive the dividend on the stock mentioned therein. (*p*)

Bills of lading also made out to the order of the shipper or his assigns, are negotiable and transferable by indorsement and delivery from the shipper, so as to vest the property therein named in the indorsees as absolutely and effectually as if the goods themselves had been delivered into their hands. (*q*)

West India Dock warrants also, in compliance with the usages of trade, have been held negotiable and transferable, so as to vest the property in goods deposited in the docks in the holder of the warrant. (*r*)

Change of interest by NOVATION and SUBSTITUTION.

Substitution of a NEW CREDITOR in the place of the ORIGINAL CREDITOR.—Although personal contracts cannot in general, strictly and technically speaking, be assigned, so as to give the assignee a right of action upon them in his own name, yet a new contract may, in the case of simple contracts, be substituted for the old one, (*s*) so as to produce, to a certain extent, the effect that an assignment would have, if sanctioned and recognised by the law. If, for example, a debtor has assented to the substitution of a new creditor, in lieu of the party with whom the debt was originally contracted, and the original liability is by consent of all parties extinguished in favour of the new liability to the new creditor, the latter is entitled to an action in his own name upon the new and substituted contract.

"A novation may take place," observes Pothier, "by the intervention of a new creditor, where a debtor, for the purpose of being discharged from liability to his original creditor by the order of that creditor, contracts a new obligation in favour of a new creditor." (*t*) By the civil law a novation arose when any new contract was entered into with intent

(*o*) 17 Geo. 3, c. 30, s. 1.

(*p*) *Partridge v. Bank of England*, 13 Law J., N. S. (Q. B.) 281.

(*q*) *Lickbarrow v. Mason*, 2 T. R. 63; 6 East, 19, n. s. c. *Cuming v. Brown*, 9 East, 505, ante p. 61, 62.

(*r*) *Zwinger v. Samuda*, 1 Moore, 12; 7

Taunt. 265, s. c. *Lucas v. Dorrien*, 1 Moore, 29; 7 Taunt. 278, s. c.

(*s*) *Browning v. Stallard*, 5 Taunt. 450. *Palmore v. Colburn*, C. M. & R. 65. *Taylor v. Hillary*, ib. 241; 5 Tyr. 373, s. c. *Turner v. Hardey*, 9 M. & W. 770.

(*t*) Pothier, partie 3, ch. 2, art. 1.

A landlord, being indebted to the plaintiff, gave to the plaintiff an order upon the defendant, his tenant, to pay the plaintiff his, the landlord's debt, to the plaintiff, out of the next rent that would become due; the plaintiff transmitted this order to the defendant, but had not any communication with him upon the subject. At the next rent-day the defendant produced the order to his landlord, and told the landlord he would pay the amount of it to the plaintiff; he then paid the difference between the amount of the order, and the sum due for the rent, and thereupon obtained a receipt from the landlord for the whole amount of the rent. The plaintiff subsequently applied to the defendant for the debt specified in the order, when the defendant refused to pay it, and the plaintiff then brought an action for the money; but it was held, that as there had been no personal communication between the plaintiff and defendant upon the subject of the order, and the plaintiff had not consented to look to the defendant instead of his original debtor for the payment of the money mentioned therein, he could not maintain his action. "If," it was observed, "there had been an agreement between the three parties, and the plaintiff had undertaken to look to the defendant, and not to the original debtor, that would have been binding, and the plaintiff might have maintained an action upon the agreement, but, in order to give him that right of action, there must be an extinguishment of the intermediate debt. No such bargain was made between the parties in this case. Upon the defendant's refusing to pay the plaintiff, the latter might still have sued the landlord his original debtor. (g)

So long as the debtor has entered into no binding contract with the party in whose favour the order is made, the order is a mere authority or direction, which may, as Pothier observes, be revoked by the creditor, and cannot, therefore, convey to the payee any right of action for the money. Thus, where the plaintiff, being indebted to one Jones, gave the defendant 8*l.* to pay Jones, and the defendant gave the plaintiff a written promise to pay the money, but before he had communicated with Jones and promised to pay him the money, and before Jones had consented to look to him instead of the plaintiff for the amount, the plaintiff countermanded the order, and required the defendant to return him the money; it was held that he was entitled so to do, and that the defendant was bound to pay it back, inasmuch as he had not placed himself under any engagement with Jones to pay it to him. (h) When, however, the debtor or the depositary of money has assented to the order, and promised the payee or remittee to

obligationem, et secundam ei accedere."—Lib. 3, tit. 30, § 3.

(g) *Wharton v. Walker*, 4 B. & C. 163; 6 D. & R. 288, a. c. *Maxwell v. Jameson*, 2

B. & Ald. 55. *Cuxon v. Chadley*, 3 B. & C. 591; 5 D. & R. 417, a. c.

(h) *Owen v. Bowen*, 4 C. & P. 93—96. *Taylor v. Lendey*, 9 East, 49.

debt due to him from A., the plaintiff can have no right of action upon the defendant's promise to pay the money.

In a joint action by two plaintiffs upon an account stated, it appeared that the defendant was indebted to Moor, one of the plaintiffs, in a large sum of money, and afterwards the other plaintiff was admitted a partner with Moor, and then a further debt was contracted by the defendant with the new partnership, after which an account was settled between the defendant and the two plaintiffs, and it was agreed that all the money due to Moor before his partnership with the other plaintiff, should be taken into that account, and that the balance should be paid to both the plaintiffs; and it was held, that the action was properly brought by them jointly. (b) But if there had been no special agreement or consent on the part of the defendant to substitute the one debt for the other, the plaintiffs would not, by reason of any agreement amongst themselves, have been entitled to join in the action. (c)

Drafts and orders for the payment of money operating by way of NOVATION and SUBSTITUTION.—An order addressed by a creditor to the defendant his debtor, given to the plaintiff, to whom such creditor is indebted, in satisfaction of his debt, and presented by the plaintiff to the defendant, and assented to by the latter, operates as a substitution of a new debt in the place of the original demand. But the mutual assent of the three parties is essential to the novation, as the original demand is not extinguished and annihilated, if the consent and concurrence of any one of the three are wanting.

"When a creditor," observes Pothier, indicates a person to whom the debtor may pay the amount of his debt, this indication does not amount to a novation; so long as the debtor does not contract any obligation to the person indicated, but continues the debtor of the creditor who made the indication." The direction so given, he observes, is a mere mandate, which is revocable, and does not constitute any novation, until it has been *assented to* by the debtor. (d) By the common law there must be not only an assent on the part of the debtor to whom the order is addressed, but there must be also the express concurrence of the person in whose favour the order is made, manifesting his assent to the change of liability. If he is not a party to the contract, the original debt is not released and extinguished, there is no novation, and can be no substitution. (e)

(b) *Moor v. Hill*, 2 Peake, 10.

(c) *Wilford v. Wood*, 1 Esp. 180.

(d) Pothier, partie 3, c. 2, art. 6, § 4.

(e) In Justinian's Institutes, it is ordained

"Solum NOVATIONEM prioris obligationis fieri, quoties hoc ipsum inter contrahentes expressum fuerit, quod propter novationem prioris obligationis convenerunt: alioqui et manere pristinam

A landlord, being indebted to the plaintiff, gave to the plaintiff an order upon the defendant, his tenant, to pay the plaintiff his, the landlord's debt, to the plaintiff, out of the next rent that would become due; the plaintiff transmitted this order to the defendant, but had not any communication with him upon the subject. At the next rent-day the defendant produced the order to his landlord, and told the landlord he would pay the amount of it to the plaintiff; he then paid the difference between the amount of the order, and the sum due for the rent, and thereupon obtained a receipt from the landlord for the whole amount of the rent. The plaintiff subsequently applied to the defendant for the debt specified in the order, when the defendant refused to pay it, and the plaintiff then brought an action for the money; but it was held, that as there had been no personal communication between the plaintiff and defendant upon the subject of the order, and the plaintiff had not consented to look to the defendant instead of his original debtor for the payment of the money mentioned therein, he could not maintain his action. "If," it was observed, "there had been an agreement between the three parties, and the plaintiff had undertaken to look to the defendant, and not to the original debtor, that would have been binding, and the plaintiff might have maintained an action upon the agreement, but, in order to give him that right of action, there must be an extinguishment of the intermediate debt. No such bargain was made between the parties in this case. Upon the defendant's refusing to pay the plaintiff, the latter might still have sued the landlord his original debtor. (g)

So long as the debtor has entered into no binding contract with the party in whose favour the order is made, the order is a mere authority or direction, which may, as Pothier observes, be revoked by the creditor, and cannot, therefore, convey to the payee any right of action for the money. Thus, where the plaintiff, being indebted to one Jones, gave the defendant 8*l.* to pay Jones, and the defendant gave the plaintiff a written promise to pay the money, but before he had communicated with Jones and promised to pay him the money, and before Jones had consented to look to him instead of the plaintiff for the amount, the plaintiff countermanded the order, and required the defendant to return him the money; it was held that he was entitled so to do, and that the defendant was bound to pay it back, inasmuch as he had not placed himself under any engagement with Jones to pay it to him. (h) When, however, the debtor or the depository of money has assented to the order, and promised the payee or remittee to

obligationem, et secundum ei accedere."—Lib. 3, tit. 30, § 3.

(g) *Wharton v. Walker*, 4 B. & C. 163; 6 D. & R. 288, n. c. *Maxwell v. Jameson*, 2

B. & Ald. 55. *Cuzon v. Chadley*, 3 B. & C. 591; 5 D. & R. 417, n. c.

(h) *Owen v. Bowen*, 4 C. & P. 93—96. *Taylor v. Lendey*, 9 East, 49.

hold the amount specified at his disposal, the authority to pay the money is irrevocable; the original debt is discharged, and none of the parties can then recede from the arrangement. "The transaction falls within that class of cases where, when an order has been given to a person who holds goods to appropriate them in a particular manner, and he has engaged to do so, none of the parties are at liberty, without the consent of all, to alter that arrangement." (i)

D. applied to the plaintiff to lend him the sum of 70*l.*, but the plaintiff refused to advance it without security, whereupon D. gave to the plaintiff an order upon the defendants, who were his debtors, to pay to the plaintiff the amount of their debts. This order was forwarded by the plaintiff to the defendants, with a request that they would acknowledge their having given him, the plaintiff, credit for it. The defendants accepted the order, and promised that they would pay all the money that they owed D. to the plaintiff, and the plaintiff then advanced 70*l.* to D. Subsequently the defendants refused to pay the amount of the debt to the plaintiff, and an action having been brought against them by the latter in his own name, it was held that he was entitled to recover it. (k) Here, the defendant, as soon as he had assented to the order, was discharged from all further liability to D., the original creditor, (l) and the extinguishment of that debt consequently formed a sufficient consideration to support the new contract or promise to pay the amount of it to the plaintiff. In the absence of an express assent on the part of the debtor, no action could, of course, have been maintained by the plaintiff in his own name, as the transaction, wanting the concurrence of the debtor, would have amounted merely to an assignment of a *chose in action*, and would not have given to the plaintiff any right of action in a court of law. (m) "Where a party entitled to money assigns over his interest to another, the mere act of assignment does not entitle the assignee to maintain an action for it. The debtor may refuse his assent, but if there be anything like an assent on the part of the holder of the money, in that case I think an action is maintainable." (n)

A considerable sum of money being due from the defendant to S. upon a balance of account, the exact amount of which had not been ascertained,

(i) *Walker v. Rostrom*, 9 M. & W. 421. *Meert v. Moessard*, 1 M. & P. 11. *Baron v. Husband*, 4 B. & Ad. 614; 1 N. & M. 730, s. c. *McCarthy v. Colvin*, 9 Ad. & E. 617. *Peate v. Dicken*, 1 C. M. & R. 422; 5 Tyr. 117; 3 Dowl. 171, s. c. *Lacy v. M'Neile*, 4 D. & R. 7.

(k) *Israel v. Douglas*, 1 H. Bl. 239.

(l) *Buller, J.*, 3 T. R. 180.

(m) *Wallake v. Hurley*, 1 Cr. & J. 83.

(n) *Ellenborough, C. J.*, *Surtees v. Hubbard*,

4 Esp. 203. The obligor in a *respondentia* bond, who had indorsed a memorandum by which he promised to pay the amount thereby secured to any person to whom the obligee should assign it, was held liable in an action of *assumpsit* at the suit of an assignee of the bond. *Fenner v. Mears*, 2 W. Bl. 1269. *Master v. Miller*, 4 T. R. 342, but the authority of this case has been doubted. *Johnson v. Collings*, 1 East, 104; 14 East, 587, n. (a). *Barlow v. Bishop*, 1 East, 432.

S. gave to Messrs. Solly and Sons, to whom he was largely indebted, a letter addressed to the defendant, saying, "I shall be obliged by your paying to Messrs. Isaac Solly and Sons the balance due to me for building, and their receipt shall be a sufficient discharge to you." This letter was forwarded by Solly and Sons to the defendant, inclosed in a letter from themselves, requesting "his due attention to the order." The defendant replied, "I have received your letter, inclosing Mr. Streatham's, and shall be happy to make the payment to you, instead of to him, as requested;" and it was held, that the defendant, after his receipt and acceptance of the order, held the money mentioned therein at the disposal of Messrs. Solly, and was accountable to them, and no one else, for the amount deposited in his hands. (o)

In these cases, when, by the accession and agreement of all the parties interested, the original or intermediate debt is extinguished, the promise to pay the amount thereof to a third party is not, of course, a promise to answer for the debt of another within the statute of frauds, as no such debt exists: it is a new, original, and independent engagement, founded upon the merger and extinguishment of the pre-existing debt or demand. (p)

A doubt is raised by Pothier and some of the civilians as to whether an order by a creditor upon a debtor, in favour of a third party, for less than the amount of the debt, accepted by the debtor, and paid to such third party, operates as an extinguishment of the whole debt, or only so much of it as is covered by the amount mentioned in the order; and they treat it as a question of intention, to be determined by the circumstances of the particular case. By our own common law, it is clear that it would be only a discharge *pro tanto*, in the absence of a special agreement founded upon sufficient consideration for the release and discharge of the residue of the debt. (q)

(o) *Crowfoot v. Gurney*, 2 M. & Sc. 473. *Hutchinson v. Heyworth*, 9 Ad. & E. 375.

(p) *Anstey v. Marden*, 4 B. & P. 131. *Taylor v. Hillary*, 1 C. M. R. 741; 5 Tyr. 373, s. c. *Bird v. Gammon*, 3 Bing. N. C. 889. *Goodman v. Chase*, 1 B. & Ald. 297. *Lacey v. M'Neile*,

4 D. & R. 10. *Hodgson v. Anderson*, 5 D. & R. 746, 747. *Browning v. Stallard*, 5 Taunt. 450.

In no case, of course, can a simple contract be substituted for a specialty.

(q) *Heathcote v. Crookshanks*, 2 T. R. 27. *Fitch v. Sutton*, 5 East, 230.

CHAPTER XII.

OF THE RIGHT OF ACTION EX CONTRACTU WHEN THERE HAS BEEN A CHANGE OF INTEREST BY BANKRUPTCY OR INSOLVENCY.

SECTION I.—Effect of bankruptcy and insolvency as a transfer to the assignees for the time being of all the bankrupt's and insolvent's real and personal estate, and all his rights of action *ex contractu*—Of the right of action of the assignees upon the bankrupt's or insolvent's real and personal covenants, bonds, and choses in action—Contracts and choses in action in which the bankrupt has a bare legal title as trustee, and no beneficial interest, do not pass to the assignees—Aliter if the bankrupt has the legal title and a possibility of a beneficial interest.

SECTION II.—*Simple Contracts*—Of the right of action of the assignees upon bills of exchange and promissory notes payable to the bankrupt—No right of action passes to them upon bills and notes which the bankrupt holds as trustee or agent, and in which he has no beneficial interest—Not upon any bill, note, contract, or security which has been assigned by the bankrupt to a third party, so as to give the latter a claim in equity thereto—Of the right of election of the assignees to adopt or abandon the executory simple contracts of the bankrupt—Their right of action to recover money paid away by the bankrupt, or money belonging to his estate in the hands of third parties—Contracts with the bankrupt during the bankruptcy—Either the bankrupt or the assignees may sue thereon—All the assignees must be made plaintiffs in an action brought by them in their representative character—They may sue in their representative character or in their own right upon contracts made during the bankruptcy—Of the bankrupt's right during the bankruptcy to the earnings of his own personal labour—Of his right *ex contractu* under a second commission—Of the right of action of a trustee under the Scotch bankrupt act.

SECTION III.—*Of the right of action of the assignees upon contracts in which the bankrupt is interested in right of his wife, or in which he is jointly interested with other persons*—Transfer to the assignees of the bankrupt's disposable interest in his wife's real and personal estate—The assignees can stand in no better position as regards the wife's property than the bankrupt himself—The wife's choses in action recoverable only in a joint action by the assignees and the wife—Transfer to the assignees of a bankrupt's interest in a partnership—Joint actions by the assignees and the solvent partners upon partnership contracts—Right of the assignees to use the names of the solvent partners in such actions—Of joint and separate commissions against bankrupt partners, and the right of action of the assignees under such commissions.

SECTION IV.—*Of the appointment of new assignees*—Effect of changes by deaths, retirements, and new appointments—Right of the new assignees to continue actions commenced by their predecessors.

SECTION I.

OF THE RIGHT OF ACTION OF THE ASSIGNEES UPON CONTRACTS UNDER SEAL.

By 6 *Geo. 4, c. 16*, passed for the purpose of consolidating and amending the laws relating to bankrupts, the Lord Chancellor is authorized, upon the petition of the creditor of a trader who has committed an act of bankruptcy, to appoint commissioners under the great seal, who shall have full power and authority to take such order and direction with all the lands, tenements, and hereditaments of the bankrupt, both within this realm and abroad, as well copy or customaryhold as freehold, which he shall have had in his own right before he became bankrupt, as also with all such interest in any such lands, tenements, and hereditaments, as such bankrupt might lawfully depart withal, and with all his money, fees, offices, annuities, goods, chattels, wares, merchandize, and debts, wheresoever they may be found or known, and to make sale thereof, or otherwise order the same for satisfaction and payment of the creditors of the said bankrupt. (a) The commissioners are to appoint provisional assignees of the bankrupt's real and personal estate, who may be removed at the meeting of the creditors for the choice of assignees, if they shall think fit. (b) Provision is made for the choice of assignees by the general body of creditors, and for the assignment by the commissioners to the assignee or assignees so chosen of all the real estate, (excepting copy or customaryhold estate, which the commissioners themselves are authorized to sell,) and of all the bankrupt's disposable interest in lands, tenements, or hereditaments, which may come to him by purchase, devise, or descent, or which may revert to him before he shall have obtained his certificate, and of all deeds and writings respecting the same; also of all the bankrupt's present and future personal estate, and all personal property which he may acquire by purchase or otherwise, before he shall have obtained his certificate, and all debts due or to be due to him; and it is provided that such assignees shall have like remedy to recover the same in their own names, as the bankrupt himself might have had, if he had not been adjudged bankrupt. (c) The act of 1 & 2 *Wm. 4, c. 56, s. 22*, provides

(a) 6 *Geo. 4, c. 16, s. 12.*
(b) *S. 45.*

(c) 6 *Geo. 4, c. 16, ss. 53, 54.*

for the selection by the Lord Chancellor of official assignees in all bankruptcies prosecuted in the Court of Bankruptcy, one of which official assignees is in all cases to be an assignee of each bankrupt's estate and effects, together with the assignee or assignees to be chosen by the creditors; and until assignees shall have been chosen by the creditors of each bankrupt, such official assignee shall be enabled to act, and shall be deemed to be, to all intents and purposes whatsoever, a sole assignee of each bankrupt's estate and effects. And it is then enacted, that all the real and personal estate and effects of the bankrupt, present and future, which by the laws previously in force might be assigned by the commissioners, shall become absolutely vested in and transferred to the assignee or assignees for the time being, by virtue of their appointment, without any deed or assignment for that purpose, as fully to all intents as if such estate and effects were assigned by deed to such assignees, and the survivor of them; and a certificate of the appointment of such assignees, purporting to be under the seal of the said Court of Bankruptcy, shall be received as evidence of such appointment in all courts and places whatsoever, without further proof. (*d*)

The action in the case of a town fiat, therefore, must be commenced in the name of the official assignee alone, or in the names of the official assignee and the assignee chosen by the creditors; and in country fiats by the latter, or by the provisional assignee, according to circumstances. (*e*)

All the real and personal estate and effects also of an insolvent prisoner, and all the future real and personal estate which he may acquire before he becomes entitled to his final discharge, and all debts due or growing due to him before such discharge, are now, by the order of the court, established for the relief of insolvent debtors, under the act of 1 & 2 *Vict. c. 110*, vested in the provisional assignee for the time being, who is empowered "to sue in his own name if the court shall so order, for the recovering, obtaining, and enforcing the estates, debts, effects, or rights" of the insolvent.

It has been held, however, that the order of the court is not necessary to enable the provisional assignee to sue; it is merely affirmative of his right of action, and the want of it will constitute no defence to an action brought by the provisional assignee. (*f*)

(*d*) 1 & 2 *W. 4*, c. 56, ss. 24, 25, 28.

(*e*) *Munk v. Clarke*, 3 *M. & Sc.* 463; 10 *Bing.* 102, s. c. *Page v. Bauer*, 4 *B. & A.* 345. *Moult v. Massey*, 1 *B. & Ad.* 686.

(*f*) *Doe d. Clark v. Spencer*, 11 *Moore*, 7; 3 *Bing.* 203, s. c. *Dance v. Wyatt*, 6 *Bing.* 488; 4 *M. & P.* 201, s. c.

The court is also directed to appoint an assignee or assignees of the estate and effects of the insolvent; and on acceptance of the appointment, the estate and effects vested in the provisional assignee are immediately, by virtue of such appointment, vested in such assignee or assignees, from the date of the vesting order, who are empowered "to sue from time to time, as there may be occasion, in his or their own name or names, for the recovering, obtaining, and enforcing of any estate, effects, or rights of such prisoner. (g) Under the last insolvent acts, all the estate and effects of an insolvent petitioner become vested in the official assignee upon the presentation of the petition, (h) and in the general assignees by virtue of their appointment, (i) who are empowered to sue for the recovery of the property in their own names, and enforcing the rights of the petitioner for the benefit of the creditors. (k) But until an assignee shall be chosen by the creditors of the petitioner, the official assignee nominated by the commissioner upon the filing of the petition of such petitioner, shall be enabled to act, and shall be deemed to be, to all intents and purposes, a sole assignee of the property of such petitioner; and if the commissioner shall so order, may sell or otherwise dispose of such property, or any part thereof.

The rights of the assignees of an insolvent debtor are in most respects the same as those of the assignees of a bankrupt; and the rules of law and adjudged cases regulating the right of action of the one class of assignees, will generally be found applicable to, and be made to govern, the right of action of the other.

ALL COVENANTS REAL annexed to estates in fee, and chattel interest, in land, in which a bankrupt or insolvent is beneficially interested, pass, together with the estates to which they are annexed, to the assignees by virtue of their appointment, and they have the same right of action upon them in their own names, as the bankrupt or insolvent himself would have had, in case he had not become bankrupt; (l) and as regards copyholds and estates tail, which are directed to be sold by the commissioners, the assignees may maintain an action of debt for the rents and profits thereof until the sale has been effected; and they have also the same power and authority for enforcing the observance of all covenants, conditions, and agreements in respect of such lands, as the bankrupt would have had in case he had not been adjudged bankrupt. (m)

(g) *Yorks v. Brown*, 10 M. & W. 78; 1 & 2 Vict. c. 110, s. 51; and see the previous act, 7 Geo. 4, c. 57, ss. 16, 19, 24.

(h) 5 & 6 Vict. c. 116, s. 1.

(i) *Ib.* s. 2.

(k) 7 & 8 Vict. c. 96, s. 13.

(l) *Parker v. Manning*, 7 T. R. 538. *Bedford v. Brutton*, 1 Sc. 245; 1 Bing. N. C. 399, s. c.

(m) 3 & 4 Wm. 4, c. 74, s. 67. *Doe v. Liversedge*, 11 M. & W. 517.

All personal covenants also, bonds, contracts under seal, and all *choses in action*, in which a bankrupt or insolvent is beneficially interested, vest in the assignees by virtue of their appointment, and they are the only parties entitled to maintain an action upon them, both in respect of breaches which accrued prior to the bankruptcy or insolvency, and those which have taken place subsequently thereto. (*n*) But the assignees take such real and personal estate only as that in which the bankrupt or insolvent had the equitable, as well as the legal interest, and which can consequently be applied to the payment of his debts. (*o*) If, therefore, he is clothed with a mere legal estate in lands as trustee, that estate still remains in him, notwithstanding his bankruptcy, and the appointment of assignees. (*p*) If by the assignment of a debt, or other chose in action not assignable at law, he has given to the assignee of such debt a claim in equity thereto, no right of action passes to the assignees, (*q*) as the money, when recovered, is not distributable among the creditors; the action, therefore, must still be brought in the name of the bankrupt, in whom the naked legal title continues to be vested. (*r*)

A bankrupt obligee brought an action upon a bond, and the defendant having pleaded the bankruptcy of the plaintiff, and the transfer of the right of action upon the instrument to his assignees under the commission, the plaintiff replied, that prior to the bankruptcy he had, by indenture, assigned the bond, subject to a proviso for redemption, as a further security to certain persons to whom he was indebted on a cognovit, in more than the amount of the bond; and that the balance of the debt remaining unpaid was larger than the amount of the bond; and it was held, upon demurrer, that as the balance of the unpaid debt exceeded the amount of the bond, and no other valuable security appeared to have been given for the same debt, the bankrupt had no possibility of a beneficial interest in the bond, which could pass to the assignees, and that the action consequently was well brought in his name. (*s*) But if the bankrupt possesses a legal interest and estate, with a possibility of a *beneficial* interest, from which a benefit to his creditors may result, such legal interest and possibility of benefit will pass to the assignees. (*t*) And in the case of

(*n*) 6 Geo. 4, c. 16, s. 63; 1 and 2 Wm. 4, c. 56, s. 25.

(*o*) *Garry v. Sharratt*, 10 B. & C. 716. *Sumpster v. Cooper*, 2 B. & Ad. 223. *Tibbitts v. George*, 5 Ad. & E. 116; 6 N. & M. 808, s. c.

(*p*) *Scott v. Surman*, Willes, 402.

(*q*) *Tibbitts v. George*, 5 Ad. & E. 113.

(*r*) *Webster v. Scates*, 4 Doug. 7. *Winch v. Kesley*, 1 T. R. 619. *Carpenter v. Marnell*, 3 B. & P. 40. *Howell v. M'Ivers*, 4 T. R. 690.

Heath v. Hall, 4 Taunt. 326. *Chalmers v. Page*, 3 B. & Ald. 697. *The Queen v. Churchwardens of Brancaster*, 2 N. & P. 580.

(*s*) *Dangerfield v. Thomas*, 9 Ad. & E. 292; 1 P. & D. 287.

(*t*) Per Lord Alvanley, 3 B. & P. 41. *Carvalho v. Burn*, 4 B. & Ad. 393; 1 Ad. & E. 883. *Doe d. Shaw v. Steward*, 1 Ad. & E. 300. *Parnham v. Hurst*, 8 M. & W. 743.

the assignment of a debt, or other *chose in action*, if the debtor has received no notice of the assignment, the equitable interest in the debt will not pass, so as to deprive the assignees of their legal title under the bankrupt and insolvent acts. (*u*)

SECTION II.

OF THE RIGHT OF ACTION OF THE ASSIGNEES UPON SIMPLE CONTRACTS.

BILLS OF EXCHANGE and PROMISSORY NOTES.—If a bill or a promissory note not negotiable by law, has been nevertheless indorsed and assigned by a bankrupt or insolvent before his bankruptcy or insolvency, then as the indorsement passes the beneficial interest, and the right to the money in equity, to the indorsee, and leaves a mere naked legal title in the indorser, the action must, notwithstanding the bankruptcy, be brought in the name of the bankrupt. (*a*). If, again, a bill of exchange has been indorsed merely for the accommodation of the bankrupt, then, as the latter has no right of action upon the bill against the acceptor, no right of action can pass to the assignees; and as the bill, in their hands, could not be made available for the benefit of the creditors, it does not pass to them, but remains with the bankrupt, who in several instances has indorsed the bill after his bankruptcy, so as to give to the *bonâ fide* indorsee a right of action thereon against the accommodation acceptor. (*b*) And it has been held, that if a bill has been delivered by the bankrupt for a valuable consideration to another, so as to transfer to him the equitable interest therein, the bankrupt may, after his bankruptcy, indorse the bill, and thus complete the legal title (*c*) and he may, of course, indorse all bills and notes which he holds as agent or trustee for another. (*d*) But all bills of exchange and promissory notes, holden *bonâ fide* by the bankrupt or insolvent for a valuable consideration, and in which he is beneficially interested, vest of course in the assignees, and may be put in suit by them in their own names. (*e*)

(*u*) *Dean v. James*, 1 Ad. & E. 809. *Buck v. Lee*, ib. 804.

(*a*) *Carpenter v. Marnell*, 3 B. & P. 40. *Mogg v. Baker*, 3 M. & W. 197.

(*b*) *Arden v. Watkins*, 3 East, 317. *Wallace v. Hardacre*, 1 Campb. 46. *Willis v. Freeman*, 12 East, 56.

(*c*) *Smith v. Pickering*, N. P. Peake, 50. *Lempriere v. Pasley*, 2 T. R. 485. *Watkins v. Maule*, 2 Jac. & Walk. 243. *Ex parte Greening*, 13 Ves. 206.

(*d*) *Gibson v. Carruthers*, 8 M. & W. 333.

(*e*) *Willis v. Freeman*, 12 East, 656. *Obbard v. Betham*, M. & M. 488.

Under the bankrupt law, the assignees possess the same remedies for the recovery of the bankrupt's debts and *choses in action*, and for the recovery of unliquidated damages for breaches of contract in which the bankrupt is beneficially interested, as the bankrupt himself would have had, had he not become bankrupt. (*f*) They may recover freight due for the carriage of goods in the bankrupt's ship, (*g*) for the profits and wages of the work and personal labour of the bankrupt which accrued due before the bankruptcy, and for premiums of insurance which the bankrupt has either paid over, or which he has bound himself to pay over, and which are considered by the custom of trade as actually paid over to the underwriters. (*h*)

All beneficial rights and interests, indeed, which the bankrupt or insolvent has, and which can be turned to profit, and disposed of for the benefit of his creditors, vest in the assignees, together with all the powers possessed by the bankrupt for turning those rights into possession.

Among these beneficial rights and interests are *executory* contracts, in which the bankrupt is interested, and from which benefit may accrue to the estate, and which can be performed on the part of the bankrupt by the assignees themselves. "In order to enforce these contracts, it is only necessary that the assignees should perform all that the bankrupt was bound to perform, as precedent or cotemporary conditions, at the time when he was bound to perform them, and the bankruptcy has no other effect on the contracts than to put the assignees in the place of the bankrupt, neither rescinding the obligations on either party, nor imposing new ones, nor anticipating the period of performance on either side." (*i*) The assignees consequently may sue upon all executory contracts of sale entered into with the bankrupt, either for the non-delivery of goods and chattels, stock, or shares, purchased by the bankrupt, (*k*) or for the non-acceptance of property sold by him. (*l*) And the bankrupt cannot, by stipulations inserted in a contract made by him with third parties, restrict the legal rights of the assignees, or deprive them of property, or of the benefit of a contract to which they would otherwise be entitled. (*m*) But as the assignees have an election to adopt the contract or not as they may think fit, (*n*) their intention to take it must be de-

(*f*) *Wright v. Fairfield*, 2 B. & Ad. 727.

Porter v. Vorley, 2 M. & Sc. 141; 9 Bing. 93,

n. c. *Drake v. Beckham*, 11 M. & W. 317.

(*g*) *Splidt v. Bowles*, 10 East, 279.

(*h*) *Power v. Butcher*, 10 B. & C. 329.

Drake v. Beckham, 11 M. & W. 318.

(*i*) *Parke, B., Gibson v. Carruther*, 8 M. & W. 333.

(*k*) *Lord Tenterden, Boorman v. Nash*, 9 B.

& C. 152. *Lawrence v. Knowles*, 5 Bing. N. S. 399. *Collis v. Stone*, 1 Ad. & E., N. S. 655.

(*l*) *Hare v. Waring*, 3 M. & W. 362.

(*m*) *Tripp v. Armitage*, 4 M. & W. 699. *Rouch v. Gt. West. Rail. Co.*, 1 Ad. & E., N. S. 51, 64.

(*n*) *Gibson v. Carruthers*, 8 M. & W. 326—329.

clared within a reasonable time, otherwise they will be deemed to have abandoned the contract, and discharged the defendant from his liability to complete it. (*o*)

Some executory contracts, founded upon the personal skill and talent of the bankrupt, or upon a mutuality of obligation and liability, are discharged by the bankruptcy when nothing has been done under them. (*p*)

The assignees represent the creditors for all purposes, as well as the insolvent or bankrupt himself, and if any fraud exists in a transaction to which the bankrupt or insolvent was a party, they may take advantage of it for the benefit of the creditors, (*q*) and may consequently make claims which a bankrupt or insolvent himself would be estopped from doing. If a bankrupt or insolvent, in contemplation of an act of bankruptcy, or a petition to the insolvent court, makes a voluntary conveyance of his personal, or real estate, in fraud of his creditors, such conveyance is void as against the assignees, and they are absolutely entitled to the property professed to be transferred. They may sue upon an implied contract of sale for the price of goods delivered by a bankrupt to a third party, in fulfilment of a colourable contract of sale, made with a view of defrauding the creditors, although the price has been paid over to the bankrupt; (*r*) also upon the ordinary implied promise in respect of money had and received to their use, to recover money received by an agent who sells the goods and securities of the bankrupt, and receives the price, and pays it over to the bankrupt, knowing of the act of bankruptcy; (*s*) also from a creditor, who has received payment of his debt after an act of bankruptcy by way of fraudulent preference to the other creditor, or who receives and retains possession of money voluntarily paid to him by a trader, who intended, at the time he made the payment, to take the benefit either of the insolvent act, or to be made a bankrupt; (*t*) or who has seized and sold under a writ of *f. fa.*, or other legal process, the property of the bankrupt, after the act of bankruptcy, (*u*) or the goods of an insolvent, after notice of the presentation of the petition. (*x*)

All warrants of attorney and cognovits given by an insolvent debtor

(*o*) *Lawrence v. Knowles*, 5 Bing. N. S. 408.

(*p*) *Marsh v. Wood*, 9 B. & C. 659. *Dod v. Herring*, 3 Sim. 143; 1 Russ. & M. 153, s. c.

(*q*) *Doe d. Grimsby v. Ball*, 11 M. & W. 533.

(*r*) *Russell v. Bell*, 10 M. & W. 352. *Fawcett v. Fearn*, 13 Law J., N. S. (Q. B.) 303.

(*s*) *King v. Leith*, 2 T. R. 144. *Schondler v. Wace*, 1 Campb. 487.

(*t*) *Turquand v. Vanderplank*, 10 M. & W. 193, 194. *Ogden v. Stone*, 11 M. & W. 494. *Stey v. Carter*, ib. 571.

(*u*) *Hitchin v. Campbell*, 2 W. Bl. 826; 3 Wils. 304, s. c. *Hunter v. Potts*, 4 T. R. 182. *Sill v. Worrick*, 1 H. Bl. 665. *Phillips v. Hunter*, 2 ib. 402. *Nolley v. Buck*, 8 B. & C. 160.

(*x*) *Groves v. Cowham*, 10 Bing. 10.

or petitioner, are fraudulent and void as against the assignees, unless they are filed, or judgment entered, or execution issued upon them, within twenty-one days from the date of their execution. (y) If, therefore, goods are sold under a *fi. fa.*, grounded upon defective warrants and cognovits, the assignees are entitled to the proceeds of the sale, and may sue therefor as money had and received to their use. And although the requisites of the statutes have been satisfied, yet if the execution is levied, or the sale made, after the commencement of the insolvent's imprisonment, or after he has presented his petition, such execution is invalid, as against the assignees, their title to the property being previously vested. (z)

Whenever, indeed, a third party has received money of the bankrupt under circumstances that create a right to recover it back, the assignees may sue for it as money had and received to their use.

If the bankrupt, before his bankruptcy, has lost money at play, the assignees may maintain an action of debt on 9 Anne, c. 14, against the winner to recover it back, it being part of the bankrupt's estate which has wrongfully passed to such winner. (a) They may also maintain an action of debt on 5 Geo. 2, c. 80, s. 29, against one who has sworn falsely to a debt under a commission of bankrupt, for the purpose of recovering from him double the sum so sworn to. (b)

The assignees also are "the parties grieved," within the meaning of 13 Eliz. c. 5, by a fraudulent conveyance of the bankrupt's property, and may therefore maintain an action of debt to recover the penalty given by that act, from the parties to the fraudulent conveyance. (c)

When the bankrupt himself has commenced an action before his bankruptcy, the assignees may continue the action in the bankrupt's name; but as this action might be defeated by a plea of the bankruptcy, and of the appointment of the assignees, (d) it will frequently be advisable to abandon an action so commenced, and bring a fresh one in their names. (e) As, however, a judgment in the action, commenced by the bankrupt, would be binding and conclusive upon all parties, the defendant in such action cannot, it seems, plead the bankruptcy if he is under terms to plead issuably. (f)

Contracts with the BANKRUPT during the BANKRUPTCY.—It has been held that if the bankrupt has entered into contracts, and acquired pro-

(y) *Collis v. Stone*, 4 Ad. & E., N. S. 655; 1 & 2 Vict., c. 110, s. 60.

(z) *Kelcey v. Minter*, 1 Bing. N. C. 720; 1 Sc. 616, s. c. *Groves v. Cowham*, 10 Bing. 5.

(a) *Brandon v. Pate*, 2 H. Bl. 308.

(b) *Holmes v. Walsh*, 7 T. R. 458.

(c) *Butcher v. Harrison*, 4 B. & Ad. 129; 1 N. & M. 677, s. c.

(d) *Kinnaer v. Tarrant*, 15 East, 622.

(e) *Biggs v. Coz*, 7 D. & R. 410; 4 B. & C. 920, s. c.

(f) *Staples v. Holdsworth*, 4 B. N. C. 144.

perty after his bankruptcy, and before he has obtained his certificate, he has a right to maintain actions in respect thereof in his own name, unless the assignees interfere to prevent him; that he may sue for goods sold and delivered, and for work and labour done, and materials provided by him, after he has been adjudged bankrupt, (g) inasmuch as such after-acquired property does not vest absolutely in the assignees, although they have a right to claim it; if they do not make any claim, the bankrupt has a perfect right as against all other persons, and may maintain actions accordingly. (h) When, therefore, after the bankruptcy, the defendant made a promissory note, payable to the bankrupt or his order, and the latter indorsed the note without the previous consent of the assignees; it was held, first, that as against the defendant, and as against all the world, excepting the assignees, the bankrupt was competent to make the indorsement; and, secondly, that as the defendant, notwithstanding the bankruptcy, had made the note payable to the order of the bankrupt, he could not afterwards dispute the power of the latter to indorse it, and was therefore estopped from setting up the bankruptcy as an answer to the action. (i)

Upon a contract which has been entered into before the bankruptcy, but which has not been finally completed until *after* the bankruptcy, the assignees alone are entitled to sue; and if the bankrupt brings an action, he will be nonsuited, although the assignees formally renounce their right of action. Thus, where a bankrupt was to have a commission for introducing to a tradesman a purchaser of his business, to be paid on the completion of the purchase, and after the introduction, but before the purchase, the bankruptcy took place, and the assignees brought an action for the commission, which they afterwards discontinued, and disclaimed all right to the money, and the bankrupt himself then brought an action for the commission, it was held that the assignees were the only parties entitled to sue, and that they could not transfer the claim in question to the bankrupt, or to any body else. (k) And with regard to all contracts made by the bankrupt before he obtains his certificate, the assignees may, if they please, adopt such contracts, treating the bankrupt as their agent in the transaction. (l) They may enforce payment of a bill of exchange, or negotiable security made payable to the bankrupt. (m)

(g) *Evans v. Brown*, 1 Esp. 170. *Silk v. Osborn*, id. 140. *Chippendale v. Thomlinson*, 4 Doug. 318. *Hayllar v. Sherwood*, 2 N. & M. 401.

(h) *Ashley v. Kell*, 2 Str. 1207. *Webb v. Fox*, 7 T. R. 391.

(i) *Drayton v. Dale*, 2 B. & C. 293; 3 D. & B. 534, s. c.

(k) *Hillary v. Morris*, 5 C. & P. 6.

(l) *Savory v. Chapman*, 3 P. & D. 604.

(m) *Kitchen v. Bartsch*, 7 East, 53.

They may claim the fruits of his trading, the proceeds of his inventions and discoveries, and the profits of his patent rights. (n) If the bankrupt has bestowed his work and labour and skill upon materials provided by the assignees, they are entitled to the benefit of such work and labour in common with the materials upon which it has been employed; (o) and if he has entered into an executory contract for the sale of goods, the assignees may affirm this contract, (p) and treating the bankrupt as their agent in the matter, may bring an action for the price. (q)

As the assignees take a joint interest as trustees of the bankrupt's estate, they must all be made plaintiffs in actions brought by them in their representative character. (r) When, however, in dealing with the bankrupt's property they have themselves entered into contracts upon which a right of action has accrued, they may, if the money when recovered will belong to the bankrupt's estate and be divisible among the creditors, sue as assignees, (s) or they may sue in their own right as the actual parties to such contracts, but they cannot in the same action recover debts in their own right, and likewise in their character of assignees. (t)

Of the bankrupt's right to the earnings of his own personal labour during the bankruptcy.—The bankrupt, after his bankruptcy, and before he has obtained his certificate, is entitled, as against the assignees, to the earnings of his own personal labour, without which it has been said he would be left to starve, (u) and it has consequently been held, that if the assignees themselves employ the bankrupt, and have the benefit of his personal labour under an agreement to pay him wages, he may maintain an action against them for the recovery thereof. (x) It is clear, however, that the bankrupt cannot acquire a right of property in anything beyond the produce of his mere daily personal labour reasonably necessary for his subsistence. If, therefore, he works up materials, employs subordinate agents under him, or in any way amasses money, his proprietary rights in respect thereof, may be at once annihilated by the intervention and claim of his assignees. (y) And when the bankrupt's personal labour and skill have been employed upon materials belonging to the estate, the assignees are entitled, as we have already seen, to the benefit thereof in common with the materials upon which it has been employed. (z)

(n) *Crofton v. Poole*, 1 B. & Ad. 568. *Hesse v. Stevenson*, 3 B. & P. 578.

(o) *Whitmore v. Gilmour*, 13 Law J., N. S. (Exch.) 201.

(p) *Evans v. Mann*, 2 Cowp. 569.

(q) *Misford v. Misford*, 9 Ves. 87. *Pierce v. Thornley*, 2 Sim. 177. *Hornsby v. Lee*, 2 Mad. 20.

(r) *Snelgrove v. Hunt*, 2 Stark, 424; 1 Chitt.

71, s. c.

(s) *Richardson v. Griffin*, 2 Chitt. 325.

(t) *Richardson v. Griffin*, 5 M. & S. 297.

(u) *Chippendale v. Tomlinson*, Cooke's bkpt. laws, Ld. Alvanley, C. J. *Hesse v. Stevenson*, 3 B. & P. 578.

(x) *Coles v. Barrow*, 4 Taunt. 754.

(y) *Crofton v. Poole*, 1 B. & Ad. 568.

(z) *Whitmore v. Gilmour*, 13 Law J., N. S. (Exch.) 201.

If a trader has been twice bankrupt (a) his certificate under the second commission will not enable him to acquire any property as against the assignee, in his future estate and effects, unless his estate existing at the date of his second certificate, shall have produced sufficient to pay 1*l*s. in the pound to the creditors. (b) But he has a good title to such after acquired property as against all the world, excepting the assignees, and he has a right to sue upon all contracts made with him during, and subsequent to, such second bankruptcy, unless the assignees claim the benefit of such contracts, and interfere to prevent him. (c)

Of the right of action of the trustee under the Scotch Bankrupt Act.—It has been held that the trustee appointed under the Scotch bankrupt or sequestration act of 54 Geo. 3, c. 137, must sue in the name of the bankrupt for the recovery of debts which have become due to the latter in this country, on the ground that the act contained no expressions large enough to enable the assignee to maintain an action in his own name for the recovery of such debts. (d) By the recent Scotch sequestration act, however, the trustee appears to be clothed with all the bankrupt's rights, and to be entitled to sue in this country in his own name upon the bankrupt's choses in action. (e)

SECTION III.

OF THE RIGHT OF ACTION OF THE ASSIGNEES UPON CONTRACTS IN WHICH THE BANKRUPT IS INTERESTED IN RIGHT OF HIS WIFE, OR IN WHICH HE HAS A JOINT INTEREST WITH OTHER PERSONS.

Transfer to the assignees of the WIFE'S property.—All the bankrupt's disposable interest, both absolute and contingent, in his wife's property, when such property has not been settled upon the wife for her separate

(a) So, if he has previously been discharged under the insolvent act. 5 Geo. 4, c. 56, s. 25.

(b) 6 Geo. 4, c. 16, s. 127, s. 132. *Butler v. Hobson*, 5 Scott, 824.

(c) *Herbert v. Sayer*, 2 Dowl. & L. 49; 5 Ad. & E. n. s. 965, s. c.; 13 Law J., n. s. (Q. B.) 209. *Young v. Rishworth*, 8 Ad. & E. 470; 3

N. & P. 585, s. c.; the act has a retrospective operation. *Eaton v. Braddick*, 2 C. & M. 435.

(d) *Jeffery v. M'Taggart*, 6 M. & S. 126. *Sidaway v. Hay*, 4 D. & R. 689.

(e) 2 & 3 Vict. c. 41; s. 68, 69. So with the Irish Act, *Ferguson v. Spencer*, 2 Sc. N. R. 229; 1 Man. & Gr. 987, s. c.

use, passes together with the property which the bankrupt or insolvent possesses in his own right to the assignees. They are entitled to the rents and profits of all the real estates of which the husband is seized in right of his wife, and which have not been vested in trustees for her sole and exclusive use, and to the benefit of all covenants annexed to such estates, and all contracts relating to the same.(a) A rent charge or an annuity bequeathed to the wife for life, but not limited to her separate use, passes in common with the other property to the assignees, subject to the wife's right of survivorship.(b)

It has been said that "debts due to the wife of a bankrupt *dum sola*, and other *choses in action* belonging to a wife before marriage, pass to the assignees under the commissioner's assignment, and are recoverable by them in their own name, *Miles v. Williams*, 1 P. Wms. 249."(c) The point actually decided in *Miles v. Williams* was, that the certificate of the husband would, if well pleaded, have been a bar to an action brought against him and his wife on a bond given by her before her marriage; the other question was not before the court.

The wife's debt or other *chose in action* cannot pass to the assignees under a commission or a fiat of bankruptcy, as it never was vested in the husband. The wife's right to her *choses in action* cannot be divested, except by the actual reduction of them into the possession of the husband, and this can only be done by a joint action, in which the wife is made a co-plaintiff, and in which judgment is recovered and execution actually levied by the husband, for if before execution be taken out he should die, and the wife survive him, she alone will be entitled to the benefit of the action.(d)

The bankrupt laws cannot pass to the assignees under a fiat in bankruptcy a larger right or a better title than the bankrupt himself had. The assignees must take the rights of the husband over the *choses in action* of the wife, in the same plight and condition as the husband himself had them,(e) and, as the latter could not alone maintain an action to recover his wife's debt, neither can the assignees; they must, therefore, standing collectively in the same situation as the husband before his bankruptcy, and unitedly representing him, bring a joint action in their own names and in that of the wife, for the purpose of reducing her *chose in action* into possession, and they must recover judgment, and take out execution

(a) *Doe d. Shaw v. Steward*, 1 Ad. & B. 311.

(b) *Caunt v. Ward*, 7 Bing. 608.

(c) *Tindal, C. J., Mitchell v. Hughes*, 4 M. & P. 587; 6 Bing. 792, s. c.

(d) See post, ch. 13, s. 3.

(e) *Ex parte Coysagema*, 1 Atk. 192. *Britton v. Perrot*, 2 C. & M. 597. *Hill v. Smith*, 13 Law J., N. S. Exch. 243.

in such joint action before the death of the husband, to make good their title against the wife, in case she should survive him. (*f*) It has accordingly been held in a recent case, over-ruling a contrary decision (*g*) in the Court of Exchequer, that the assignees of a bankrupt cannot alone sue on a promissory note not negotiable, given to the wife of a bankrupt before marriage, (*h*) and if the wife of a bankrupt before her marriage has assigned to a trustee a chose in action for the benefit of herself, the right to sue on that chose in action cannot pass to the assignees of the bankrupt husband; the entire equitable interest therein is in the trustee, who alone has the right to turn such *chose in action* into possession, and *he* may sue for it in the name of the husband and wife, notwithstanding the bankruptcy. (*i*)

Transfer to the assignees of the bankrupt's interest in a partnership.—If one of several partners becomes bankrupt, his right of action upon the contracts of the firm is at once transferred to the assignees, and all actions consequently in respect of the partnership contracts and transactions entered into before the bankruptcy must be brought in the names of the assignees and the solvent partners. (*k*)

If an action has been commenced by a firm in partnership its further progress may be at once stopped by a plea of the bankruptcy of one of the partners. (*l*) The action must be prosecuted in the names of the assignees and the solvent partners, and if the latter should object to the prosecution of a joint action in their names, the assignees are entitled to make use of their names and conduct the necessary proceedings without their consent. By 6 *Geo. 4, c. 16, s. 47*, it was enacted that the Lord Chancellor, upon petition, might authorise the assignees to use the name of a solvent partner without his consent, provided such partner, if no benefit was claimed by him from the proceedings, was indemnified against costs; and by the recent bankruptcy act it has been enacted, that it shall be lawful for the court of bankruptcy, when the bankrupt is a member of a firm in partnership to authorise the assignee upon his application to commence, or prosecute, any action at law, or suit in equity in the name of such assignee and of the remaining partner against any debtor of the partnership, and such judgment, decree, or order, may be obtained therein, as if such action or suit had been instituted with the consent of

(*f*) *Gayner v. Wilkinson*, 1 Bro. C. C. 49, n.
Milford v. Milford, 9 Ves. 87, 99. *Purdew v. Jackson*, 1 Russ. 1. *Honner v. Morton*, 3 Russ. 65. *Pierce v. Thornley*, 2 Sim. 177.

(*g*) *Yates v. Sherrington*, 11 M. & W. 42.

(*h*) *Sherrington v. Yates*, 12 M. & W. 864.

Hart v. Stephens, 9 Jurist, 225.

(*i*) *Parnham v. Hurst*, 8 M. & W. 750.

(*k*) *Eckhardt v. Wilson*, 8 T. R. 142. *Thomason v. Frere*, 10 East, 418.

(*l*) *Marlar v. Hartley*, 4 Doug. 22 n.

such partner, and if such partner shall execute any release of the debt or demand, for which such action or suit is instituted, such release shall be void, provided that every such partner shall have notice given him of such application, and be at liberty to show cause against it, and if no benefit is claimed by him, by virtue of the said proceedings, shall be indemnified against the payment of any costs in respect of such action or suit, in such manner as such court, upon his application, shall direct; and that it shall be lawful for such court, upon the application of such partner, to direct that he may receive so much of the proceeds of such action or suit as such court shall direct. (*m*)

If a debt be due to two persons jointly, and they both become bankrupt, and separate commissions issue against each of them, the assignees under both commissions must all be made plaintiffs in an action brought to recover the debt. (*n*) When a joint commission has been issued against a whole firm in partnership, the assignees appointed under it being assignees of the entire estate of each partner, as well as the assignees of the property of the whole firm, may in the same action recover debts due to all the partners jointly, and the separate debts due to each partner individually, for the money when recovered all goes to the same fund, to be divided among the creditors. (*o*) If such assignees, under a joint commission against several, sue only for the debts and contracts of one partner, they should describe themselves as the assignees of that partner, without at all noticing the others. (*p*) To recover joint debts the assignees must, of course, claim either under a joint commission against all the bankrupts or under separate commissions against each. (*q*) If they claim under separate commissions, then, in suing together, they can of course only recover joint demands. (*r*)

SECTION IV.

OF THE APPOINTMENT OF NEW ASSIGNEES.

The court of review in bankruptcy is expressly authorised to remove any assignee of any estate, and the order of such court thereupon is final

(*m*) 5 & 6 Vict. c. 122, s. 31.

(*n*) *Scott v. Franklin*, 15 East, 486.

(*o*) *Graham v. Mulcaster*, 4 Bing. 115; 12 Moore, 327, s. c.

(*p*) *Stonehouse v. De Silva*, 3 Camp. 399. *Harvey v. Morgan*, 2 Stark. 17.

(*q*) *Streatfield v. Halliday*, 3 T. R. 781.

(*r*) *Hancock v. Hannay*, id. 433.

and conclusive to all intents and purposes, and not subject to any review by the Lord Chancellor or otherwise. (a) And as often as any assignee shall die, or be lawfully removed, and a new assignee duly appointed, all such real and personal estate as was then vested in such deceased, or removed assignee, shall, by virtue of such appointment, vest in the new assignee, either alone or jointly with the existing assignees as the case may require, without any deed or assignment for that purpose. (b)

And whenever an assignee shall die or a new assignee or assignees shall be chosen, no action at law or suit in equity shall be thereby abated, but the court in which any action or suit is depending, may, upon the suggestion of such death or removal, and new choice, allow the name of the surviving or new assignee to be substituted in the place of the former, and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee, or assignees in the same manner as if he or they had originally commenced the same. (c)

Such new assignee may by suggestion on the record continue in his own name an action brought by the former assignee against the provisional assignee to recover the penalty for not delivering up the bankrupt's estate pursuant to 6 *Geo. 4, c. 16*, as the penalty, when recovered, is to be divided amongst the creditors. (d) He may also maintain an action upon a judgment recovered by a former assignee for damages sustained by reason of injuries to the bankrupt before his bankruptcy, as also to the assignee *as such* since the bankruptcy, the damages so recovered being part of "the debts, effects, or estate" of the bankrupt. (e)

In cases of insolvency it is enacted by 1 & 2 *Vict. c. 110, s. 42*, that all and every the real and personal estate, money, and effects vested in or possessed by the provisional assignee, shall not remain in him if he shall resign or be removed from his office, nor in his heirs, executors, or administrators, in case of his death, but shall in every such case go and be vested in his successor in office, appointed by the court. And by 7 & 8 *Vict. c. 116, s. 10*, it is further enacted that the property vested in any official assignee alone, or jointly with any assignee chosen by creditors, shall not remain in such official assignee alone, or jointly with such assignee chosen by creditors, if such official assignee shall resign or be removed from his office, nor in the heirs, executors, or administrators of such official assignee, nor in the surviving assignee alone, in case of the death of such official assignee, but all such property shall in every such

(a) 1 & 2 *W. 4, c. 56, s. 36*; 6 *Geo. 4, c. 16, s. 66*.

(b) 1 & 2 *W. 4, c. 56, s. 25, 26*.

(c) 6 *Geo. 4, c. 16, s. 67*.

(d) *Bates v. Sturges*, 5 *M. & P. 568*; 7 *Bing. 585, n. c.*

(e) *De Cosson v. Vaughan*, 10 *East, 61*.

case go to and be vested in the successor in office of such official assignee alone, or jointly with the assignee chosen by the creditors, if any, as the case may be, and whenever any assignee or assignees shall die, resign, or be removed or a new assignee shall be duly appointed, all the insolvent's estate, real and personal, and all such effects and credits as were and remained vested in such removed or deceased assignee, shall vest in the new assignee, either alone or jointly with the existing assignees as the case may require, (f) and no action at law or suit in equity shall be abated by such death, resignation, removal or new appointment, but the court in which any action or suit is depending, may, upon the suggestion of such death, resignation, or removal, and new appointment, allow the action to be continued as in the case of actions by assignees of bankrupts. (g)

(f) 5 & 6 Vict. c. 116, s. 7.

(g) 1 & 2 Vict. c. 110, s. 53; 7 & 8 Vict. c. 96, s. 16.

CHAPTER XIII.

OF THE PLAINTIFFS IN ACTIONS EX CONTRACTU WHEN THERE HAS BEEN A CHANGE OF INTEREST BY MARRIAGE.

SECTION I.—Deeds—Of the husband's right of action upon covenants running with the wife's realty—Covenants annexed to a reversion granted to the husband and wife—When the wife ought to be joined with the husband as a plaintiff, and when she may, or may not be joined, at his election—Actions in respect of rents, profits, and services issuing out of the wife's lands—Reduction of the wife's choses in action into possession—Breaches of the wife's real contracts accruing before coverture—Bonds, personal covenants, and contracts under seal, made with the wife before marriage—Contracts under seal made with the wife alone, or with the husband and wife jointly, during coverture.

SECTION II.—Simple contracts—Of the marital rights of the husband in respect of bills of exchange and promissory notes made payable to the wife before marriage—Also, in respect of simple contracts entered into with the wife during coverture, and founded upon a consideration moving from her—Simple contracts concerning the wife's lands—Forbearance from the enforcement of the wife's contract a sufficient consideration for an express promise to the husband in his own right—Of the husband's right to administer when the wife is a *feme covert* executrix or administratrix—Of the wife's right of action in the name of her husband when separated from him—When the husband is *civiliter mortuus* and the wife entitled to sue as a *feme sole*.

SECTION III.—Dissolution of the coverture by death—*The husband's rights by survivorship*—Covenants annexed to the wife's estates of inheritance—When the surviving husband ought to sue and when the heir at law of the wife—The surviving husband's right of administration to the wife's personal estate for his own benefit—His right of action upon covenants annexed to the wife's leasehold estates—Also, in respect of the wife's unrecovered choses in action—*The wife's rights by survivorship*—The surviving wife's right to her freehold and leasehold estates, and to all covenants annexed to such estates—When the surviving wife ought to sue, and when the personal representative of the husband for rent reserved on an under-lease of the wife's leaseholds—The wife's right by survivorship to all contracts under seal made with her alone, or with her and her husband jointly, during coverture—Also, to all bills of exchange and promissory notes made payable to her during coverture—And to all her unrecovered choses in action.

SECTION I.

OF THE HUSBAND'S RIGHT OF ACTION UPON THE WIFE'S REAL AND
PERSONAL CONTRACTS UNDER SEAL.

Covenants running with the wife's lands.—Upon contracts or covenants running with the wife's lands, such as covenants to repair, or to pay rent, or to grind corn at the wife's mill, broken *during the coverture*, the husband may sue alone, or he may join his wife with him as a co-plaintiff, whether such covenants have been entered into with the wife, or her ancestors, or assignors, prior to the coverture or with the husband and wife jointly during the coverture. (a) Upon covenants for the quiet enjoyment of land leased to husband and wife, (b) and upon all covenants annexed to reversions granted to the husband and wife jointly, the husband also may sue alone, or he may make his wife a co-plaintiff in the action. (c)

But when the wife's freehold is to be recovered, she must join with her husband in the proceedings, as in instances of disseisin, (d) and for breaches of covenant for title, and further assurance of the wife's lands. It has been held, that if A. conveys land to B. in fee, and covenants with him, and his heirs and assigns, to make further assurance, and these lands are assigned to J. S. and his wife, and the heirs of J. S., the husband alone, without the wife, cannot have an action upon the covenant, (e) but when the title does not come in question, and the action is merely personal, and compensation is sought only in damages, the husband may or may not at his election join the wife, for "that which the husband may discharge alone, and of which he may make disposition to his own use, for the recovery of this he may well have an action in his own name. (f)

In all actions also for a profit or demand accruing *during* coverture in respect of the real estate of the wife, the husband and wife may join, or the husband may sue alone, as in debt, for not setting out by this belonging to the wife, (g) and so for rents and services accruing to the husband

(a) *Beaver v. Lane*, 2 Mod. 217. *Alaberry v. Walby*, 1 Str. 229. *Dunstan v. Burwell*, 1 Wils. 224.

(b) Bro. Abr. Covenant, pl. 10.

(c) *Brett v. Cumberland*, 3 Bulst. 163; Cro. Jac. 399.

(d) *Odill v. Tyrrell*, 1 Bulst. 21; Bro. Abr.

Covenant, pl. 10. *Baron et Feme*, ib. pl. 23.

(e) *Middlemore v. Goodale*, 1 Roll. Abr. 348; (T) 5 Cro. Car 505.

(f) Per Dodderidge, J., *Brett v. Cumberland*, 3 Bulst. 164; Cro. Jac. 399.

(g) *Beadle v. Sherman*, Cro. Eliz. 608, 613.

during the coverture, either in respect of the real estate of the wife, (*h*) or as annexed to a reversion granted to the husband and wife jointly. (*i*)

Reduction of the wife's choses in action into possession.—If a real contract, or covenant running with the wife's lands, has been broken prior to the coverture, or rent is in arrear, or any payment, profit, or service issuing out of the wife's lands, has accrued due, and has thus become a *chose in action* at the time of the marriage, the wife must be made a co-plaintiff with the husband in any action brought by the latter for the recovery thereof. Upon all bonds and personal covenants also made with the wife before marriage, and upon all other *choses in action* belonging to the wife, the husband and wife must sue jointly. The husband acquires by the marriage a qualified property only in the wife's *choses in action*; he has the power of reducing them into his possession, but until that be done, they remain the property of the wife. In order to get them into his possession, he must bring a joint action in his own name and that of his wife, he may then recover judgment in the names of himself and his wife, and upon such judgment the husband alone may sue out execution and receive the amount of the debt, and thus acquire possession of the wife's *chose in action*; but if he neglects to bring such joint action, or, having brought the action, if at any time before taking out the execution he should die, and the wife survive him, she alone will be entitled to the debt, and may take out execution for her own benefit. (*k*)

CONTRACTS UNDER SEAL *made with the wife during coverture.*—Upon bonds and other personal contracts under seal, which have been entered into during the coverture with the wife separately, (*l*) or with the husband and wife jointly, (*m*) the husband may sue alone, treating them as his own contracts, or he may elect to give the wife an interest therein, and join her as a co-plaintiff in the action. (*n*) The wife, indeed, may sue alone and recover upon a contract under seal made with her *durant* coverture, if the coverture is not pleaded in *abatement*. (*o*)

(*h*) Pal. 207. *Wallis v. Harrison*, 5 M. & W. 142.

(*i*) *North v. Wyard*, 2 Bulst. 233.

(*k*) *Nanny v. Martin*, 1 Ch. C. 27. *Bond v. Simmons*, 3 Atk. 21; *Anon.* ib. 726. Lord Kenyon, C. J., *Milner v. Milnes*, 3 T. R. 631. *Parke, B., Gaters v. Madeley*, 6 M. & W. 423. *Sherrington v. Yates*, 12 M. & W. 865; 1 D. & L. 1041, s. c. *Hart v. Stephens*, 9 Jurist, 225.

(*l*) *Howell v. Maine*, 3 Lev. 403. The bond there was given *durant* and not *devant* coverture. *Dampier, J.*, 2 M. & S. 396. *Day v. Pargrave*, cited 2 M. & S. 396.

(*m*) *Ankerstein v. Clarke*, 4 T. R. 616. *Arnold v. Revault*, 4 Moore, 71; 1 B. & B. 443, s. c.

(*n*) *Hellyer v. Grace*, Styles, 9.

(*o*) *Bendix v. Wakeman*, 12 M. & W. 97.

SECTION II.

OF THE HUSBAND'S RIGHT OF ACTION UPON THE WIFE'S SIMPLE CONTRACTS.

Bills of exchange and promissory notes payable to the wife.—The husband may sue alone upon all bills of exchange and promissory notes payable to the wife *before* marriage, and not indorsed by her, for the marriage absolutely vests all such bills and notes in the husband. (a) In the exercise of his marital rights, also, he may at once indorse them, the wife's power of assignment over them being superseded by the marriage, and vested in the husband. (b) Upon bills and promissory notes also, made payable to the wife during the coverture, the husband may sue alone, (c) or jointly with his wife. (d) But upon all *simple* contracts, except bills of exchange and promissory notes, to entitle the wife to be joined as a co-plaintiff with her husband, the promise must not only be made to the wife, but the consideration upon which it is founded must move from her. Bills of exchange and promissory notes of themselves import a consideration, unless the contrary be shown; but in other cases the cause of action must appear to arise wholly from the act of the wife, as well as the promise be made to her, otherwise she is improperly constituted a party to the action.

SIMPLE CONTRACTS, founded upon a consideration moving from the wife.—If the personal labour and skill of the wife form the consideration for the promise, (as if a man, in consideration that she will cure a wound, or instruct his daughter in needlework, promises to pay her 10*l.*.) she may be joined with her husband as a co-plaintiff in an action to recover the money; (e) but if the wife performs the work, without any express promise having been made to pay the money to *her*, she cannot be made a co-plaintiff in the action, as the husband alone is entitled to the fruits of her labour, and the law will not *imply* any promise to the wife in respect of her personal labour and services, but to the husband alone,

(a) *McNeilage v. Holloway*, 1 B. & Ald. 221, 223. *Cumming v. Baily*, 6 Bing. 363; 4 M. & P. 36, s. c.

(b) *Connor v. Martin*, cited 3 Wils. 5. *Rawlinson v. Stone*, ib. 1.

(c) *Barlow v. Bishop*, 1 East, 432. *Barrough v. Moss*, 10 B. & C. 558; 5 M. & R.

296, s. c. *Mason v. Morgan*, 2 Ad. & E. 30; 4 N. & M. 46, s. c.

(d) *Philistirk v. Pluckwell*, 2 M. & S. 393. *Gaters v. Madeley*, 6 M. & W. 427.

(e) *Brashford v. Buckingham*, Cro. Jac. 77, 205. *Fountain v. Smith*, 2 Sid. 128.

whose servant she is considered to be. (*f*) And where an express promise was made to pay a sum of money to the wife, in case she would cure a wound and provide plaisters for the same, it was held, that as the personal skill of the wife did not alone form the consideration for the promise, but as *plaisters were to be provided*, which were the property of the husband, and bought with the husband's monies, that he alone ought to have brought the action, and that the damages could not be severed, and the judgment was therefore arrested, on the ground that the wife was improperly joined. (*g*)

The defendant being in treaty with the husband for the purchase of the wife's lands, promised the wife that if she would not prevent the husband from levying a fine to him of the land to pay her 10*l.*, or give her a riding suit. In a joint action by husband and wife for the breach of this promise, it was held that the husband might, or might not, at his election, join his wife with him as a co-plaintiff. (*h*)

The defendant, in consideration that "baron and feme had intermarried at his request," promised to them to pay unto *the feme* 8*l.* during the coverture. After verdict, in an action by the husband and wife upon this promise, it was moved in arrest of judgment that the action should have been brought by the husband alone, the promise having been made *after* the coverture; but judgment was given for the plaintiff; for it was in the election of the husband to bring the action alone, or to join with his wife. (*i*)

The defendant, in consideration of 10*l.*, paid to him by the wife, promised to marry the wife's daughter, and in default to pay her 10*l.*; and it was held that the husband and wife might bring a joint action upon this promise to recover the 10*l.* But in a joint action by husband and wife to recover money lent by the wife, where the declaration stated a promise to them to repay the money, and alleged a breach by nonpayment *ad damnum eorum*, it was held that that they could not maintain a joint action, as a feme covert cannot be possessed of money jointly with her husband. (*k*) And an action having been brought by husband and wife for the use and occupation of a messuage and lands, and for money had and received to the use of the husband and wife, stating the promises, and laying the damages to them jointly, it was held, in arrest of judgment, that the entire damage resulted to the husband, and that the

(*f*) *Buckley v. Collier*, 1 Salk. 114; 4 Mod. 156, s. c.; Carth. 251, s. c. *Offley v. Clay*, 2 Sc. N. R. 372.

(*g*) *Homes v. Wood*, 1 Barn. 75, 249.

(*h*) Roll. Abr. 32, pl. 12.

(*i*) *Hilliard v. Hambridge*, Aleyn, 36.

(*k*) *Abot v. Blofeld*, Cro. Jac. 644; 1 Rolle Rep. Baron et feme. *King v. Basingham*, 8 Mod. 199.

action ought to have been brought in his name alone. (*l*) But if it be shown that the wife has an interest in the subject matter of the contract, as if the contract be made concerning her lands, (*m*) then she may well be joined as a co-plaintiff.

An action having been brought by the husband and wife and three other persons jointly, a cognovit was given by the defendant to *all* the plaintiffs; and this was held to be a sufficient admission that the wife was interested in the contract, and that she was properly joined in the action. It was held also, that the wife might be joined with the husband and the other plaintiffs in an action against a third party, upon a special promise made by the latter to all the plaintiffs in the original action to pay the debt, in consideration that they would not enter up judgment, or take any proceedings upon the cognovit. (*n*)

It is said, moreover, to be an unquestionable rule of law, that where-soever, in case the husband should die, the action would survive to the wife, that there the wife *may* be joined; but, on the other hand, the husband may join the wife in many cases where he is not bound to join her, but may have the action alone. (*o*) But the safest plan, as appears from the above authorities, with regard to all contracts entered into with the wife during coverture, is to bring the action in the name of the husband alone, and to take no notice whatever of the wife. (*p*)

As the husband has the power of immediately enforcing a claim of the wife in a joint action, forbearance by him from so doing is a sufficient consideration to support a promise made to the husband alone, (*q*) and upon this new consideration, expressly moving from the husband, he alone must sue, as the wife is no party nor privy to such new contract or promise. (*r*)

Of the husband's right to administer when the wife is a feme covert, executrix or administratrix.—The law gives to the husband of a feme covert, executrix or administratrix, for his own security, the right of administration.—It intrusts him during the coverture with the same power over personal estate vested in the wife *in autre droit*, as he has over such property vested in her in her own right. But if he exercises the power improperly, and converts the assets to his own use, he will, of course, be

(*l*) *Bidgood v. Way*, 2 Black. 1236.

(*m*) *Dunstan v. Burwell*, 1 Wils. 224.

(*n*) *Nurse v. Wills*, 4 B. & Ad. 739; 1 N. 39, & M. 765, s. c.

(*o*) *North, J., Frodike v. Sterling*, 1 Freem. 236.

(*p*) 27 *Tatham's case*, Hen. 8, 24; Aleyn,

1. *Cottrell v. Theobalds*, Sty. 297. *Arnold v. Revault*, 4 Moore, 66.

(*q*) *Rumsey v. George*, 1 M. & S. 180.

(*r*) *Lea v. Minne*, Yelv. 84; Cro. Jac. 110, s. c. *Yard v. Ellard*, 1 Salk. 116; 1 Ld. Raym. 368, s. c.

liable for a devastavit. In respect of all personal contracts entered into with the testator, and to recover possession of debts, and all other choses in action which accrued to the deceased in his lifetime, and which are consequently vested in the wife in her representative character, the husband must bring a joint action in the names of himself and his wife, (s) as in the case of choses in action vested in the wife in her own right. But the contracts entered into with the wife herself in her representative character during the coverture being in legal effect the contracts of the husband, he may sue upon them as if they were made to himself personally, without at all noticing the wife. (t) And upon any new promise made to him in consideration of his giving further time for payment of a debt due to the wife in her representative capacity, the husband may sue alone; but the recovery in his own name is a devastavit *pro tanto* unless the money be properly administered. (u) If the husband and wife recover a joint judgment for a debt due to the wife in her representative capacity, and the wife dies, the husband cannot sue out execution upon the judgment, because he is not entitled to the thing recovered. (x) If a debt due to the wife as executrix be paid to a third party without any authority from the husband, the latter cannot maintain an action for money had and received to his use, as the debt still remains due to the wife in her representative character, and if the husband dies, the wife may bring an action for it, but if the money had been received by the authority of the husband, then it had been as his receipt, and as his money, and then the action might well have been brought in his name alone. (y)

As by the marriage the husband and wife become one person in law, the wife cannot during the coverture maintain an action in her own name without her husband, although she may be separated from him under a divorce *a mensâ et thoro*, (z) or under the provisions of a deed of separation, (a) or although the husband be an alien resident abroad, (b) who has never been in this country; (c) or being a subject, has deserted his wife and gone beyond the sea; (d) or has absconded and left the realm; (e) or become permanently resident in a foreign land. (f) And although by the special custom of the city of London, a married woman

(s) *Tirrell v. Bennett*, Sid. 299.

(t) *Amberstein v. Clarke*, 4 T. R. 616. *Yard v. Eland*, 1 Lord Raym. 365; Carth. 462, s. c. *Anon.* 1 Salk. 282.

(u) *Yard v. Ellard*, 1 Salk. 116.

(x) *Beaumont v. Long*, 1 Roll. Abr. 889 pl. 10; Cro. Car. 208, 227, 464; Co. Litt. 351 a., 351 b.

(y) *Anon.* 1 Salk. 282.

(z) *Lewis v. Lee*, 3 B. & C. 291.

(a) *Marshall v. Rutton*, 8 T. R. 545.

(b) *Stretton v. Busnach*, 1 Bing. N. C. 139.

(c) *Barden v. Keverberg*, 2 M. & W. 65.

(d) *Boggett v. Frier*, 11 East. 301.

(e) *Williamson v. Dawes*, 9 Bing. 292.

(f) *Marsh v. Hutchinson*, 2 B. & P. 226.

is enabled to carry on trade as a *feme sole* merchant, yet she can neither sue nor be sued in respect of her dealings in that capacity without her husband. (g) But although the wife has no power to sue in her own name, independently of her husband, during the coverture, yet she is entitled, under certain circumstances, when living separate from him, to maintain an action in *his name*, and the courts will prevent him from fraudulently interfering to defeat such action.

Of the wife's right of action in the name of her husband.—If the husband and wife, for example, are living separate, under sentence of separation *pendente lite* in the ecclesiastical court, (h) or under a deed of separation, (i) or have been living apart for several years, (k) the wife may bring an action in the name of the husband, on indemnifying the latter against costs.

A married woman agreed to sing at the opera for a certain reward, and the defendants undertook in writing to see her paid, but made default, whereupon the lady brought an action in her husband's name against the defendant upon their undertaking. A motion was made for a stay of proceedings, on the ground that the husband was resident abroad, and there seemed no likelihood of his ever coming to England. "But the court, without hesitation, refused the motion, saying they would throw no impediment in her way." (l) And where the husband and wife lived separate under a deed of separation, by which the husband agreed to allow the wife to enjoy, as her separate estate and property, all effects which she then had, or which she might thereafter acquire, and covenanted that he would not do any act to impede the operation of that deed, but would ratify all lawful or equitable proceedings to be brought in his or their names for recovering and obtaining such property; and the wife brought an action on a promissory note in the name of the husband and herself, and the husband released the debt, and the release was pleaded *puis darrein continuance*, the court, on application, ordered the plea to be taken off the record, and the release to be given up to be cancelled, on the ground that the release was in fraud of the deed of separation. (m)

When the husband is CIVILITER MORTUUS. and the wife entitled to sue as a FEME SOLE—An *alien enemy* has no civil rights in this country; he is disabled from suing in our courts of law, and is *civiliter mortuus*; the wife, therefore, of an *alien enemy*, if she be a subject of this country, or if

(g) *Caudell v. Shaw*, 4 T. R. 361. *Beard v. Webb*, 2 B. & P. 98.

(h) *Chambers v. Donaldson*, 9 East, 471.

(i) *Innell v. Newman*, 4 B. & Ald. 419.

(k) *Morgan v. Thomas*, 2 C. & M. 388.

(l) *Mingotti v. Drummond*, 1 Ken. notes, 469.

(m) *Innell v. Newman*, 4 B. & Ald. 419.

she be an alien *ami* domiciled in the British dominions, is considered as a *feme sole*, and may maintain an action in her own name upon all contracts that have been entered into with her, as she would otherwise be entirely remediless. (*n*) If the husband also, being a subject of this country, has been banished by act of parliament, (*o*) or has been transported for a term of years or for life, or remains on board the hulks under sentence of transportation, (*p*) or, having been transported, has not returned to this country after his term of transportation has expired, (*q*) he is considered to be civilly dead; the wife is in a state of legal widowhood, and is, therefore, able to maintain an action in her separate capacity. And if a man has separated himself from his wife, and has not afterwards been heard of for the space of seven years, that circumstance is *primâ facie* evidence of his death, (*r*) and in the absence of express proof of his being actually alive, the wife may sue alone, describing herself as a widow. (*s*)

A divorce *a mensâ et thoro* does not dissolve the relation of husband and wife, but a divorce *a vinculo matrimonii* at once puts an end to the marriage contract, and remits the parties to the rights and liabilities of single persons.

SECTION III.

DISSOLUTION OF THE COVERTURE BY DEATH—THE HUSBAND'S RIGHTS BY SURVIVORSHIP.

When the SURVIVING HUSBAND ought to sue, and when THE HEIR AT LAW of the wife, upon covenants annexed to the wife's estates of inheritance.

If the coverture be dissolved by the death of the wife, and the husband (having had issue by her inheritable) becomes tenant by the curtesy of the wife's estates of inheritance, he is clothed with the interest in all real contracts or covenants annexed to such estates, and is, consequently, the

(*n*) *Deerly v. Duchess of Mazarine*, 1 Salk. 116; 1 Ld. Raym. 147, s. c. Parke, B., *Barden v. Keverberg*, 2 M. & W. 65.

(*o*) Co. Litt. 183, a.

(*p*) *Sparrow v. Carruthers*, cited 2 Black, 1197. Lord Eldon, C. J., *Marsh v. Hutchinson*, 2 B. &

P. 232 *Ex parte Franks*, 7 Bing. 762; 1 M. & Sc. 1, s. c.

(*q*) *Carrol v. Blencow*, 4 Esp. 27.

(*r*) *Ellenborough, C. J., Doe v. Jesson*, 6 East, 85.

Hopewell v. De Pinna, 2 Campb. 114.

(*s*) *Eliza Wilmot's case*, Moore, 851.

proper party to maintain an action upon them. But upon real contracts annexed to the wife's estates of freehold and inheritance which descend after her death upon her heir at law, the husband can maintain no action, although such contracts have been entered into during the coverture with both husband and wife jointly. In an action, therefore, by the surviving husband for the breach of a covenant to repair premises demised by himself and wife, the lessee is not estopped from showing that the husband was seized in right of his wife for the term of her life, and that she died without issue, whereupon his estate and interest in the demised premises ceased and determined; (a) and if, during coverture, a lease be made by husband and wife according to the provisions of the stat. 32 Hen. 8, c. 28, s. 3, containing a covenant from the lessee to pay rent to the husband and wife and the heirs of the wife, and the surviving husband brings an action on the covenant for non-payment of the rent, the action may be defeated by a plea showing that the demised premises were the property of the wife, and that the plaintiff never had any estate in them but in right of his wife, and that she died without issue before the rent became due, leaving A. her heir at law, who claimed the rent. (b) But all "fruits fallen" during the coverture, such as a relief due in right of the wife's manor or seignory, arrears of a rent charge granted either to the wife alone, or to the husband and wife jointly, and all arrears of rent due at the death of the wife, are recoverable by the husband in his own right. For all breaches of covenants, also, not in the nature of continuing breaches, where the ultimate damage has accrued during the coverture, the husband may maintain an action in his own right after the death of his wife, although the lands have descended to her heir at law. (c) If, too, the surviving husband was seized during coverture of a rent charge in fee, fee tail, or for life, in right of his wife, he may by statute sue in his own right for arrears which accrued *before* the marriage, as well as for such as accrued during the coverture. (d)

If a debt by bond be due to a feme sole, who afterwards marries, and the husband makes a letter of attorney to a third party to receive the money, who receives it accordingly, and the wife dies, the husband shall have an action in his own right for this money, for by the receipt the property therein becomes vested in the husband. (e) So if a legacy devised to a married woman be actually received by an attorney or agent, duly appointed for that purpose by the husband alone, or by the husband and

(a) *Blake v. Foster*, 8 T. R. 487.

(b) *Hill v. Saunders*, 9 Moo. 238; 7 D. & R. 17 s. c. in error.

(c) Post ch. 14, s. 1.

(d) 32 Hen. 8, c. 37; Co. Litt. 351, b. *Andrew Ognell's case*, 4 Co. 51, a. b.; 1 Roll. Abr. *Baron & Feme*, (H.) 1.

(e) 1 Roll. Abr. 342, (D.) 5.

wife jointly, it is thenceforth no longer a *chose in action* of the wife, but money had and received to the use of the husband, who may sue for it, after the death of his wife, in his own right. (*f*) If the husband has commenced a joint action in his own name and in that of his wife, for the purpose of reducing the wife's *chose in action* into possession, and the wife dies before judgment, the action is at an end, and the unrecovered *chose in action* vests in the wife's personal representative; (*g*) but if the wife dies after judgment, but before execution, the husband alone is entitled to the benefit of the judgment, and may have execution without a *scire facias*, or he alone may have an action of debt thereon. (*h*)

Of the right of the surviving husband, as administrator jure, mariti to the wife's leasehold estates, and her unrecovered choses in action.—The surviving husband is entitled *jure mariti* to demand administration of his wife's personal estate, and may recover the same for his own use and benefit. (*i*) Having obtained letters of administration, he is clothed with all the wife's leasehold estates, or chattels real, and is the only party entitled to sue upon contracts or covenants annexed to such estates. He is entitled also to all his wife's choses in action, and every other species of personal property, whether actually vested in her and reduced into possession, or contingent or recoverable only by action or suit. (*k*) If the surviving husband should die before he has obtained a grant of administration, or, having obtained the grant before all the wife's choses in action have been reduced into possession, administration *de bonis non* of the wife must be committed, (*l*) and this is granted by the spiritual courts to the next of kin of the husband, as the party by law entitled to the property, (*m*); and if administration *de bonis non* of the wife is obtained by any third person, he is a trustee for the representative of the husband. (*n*) If administration is granted to the child of the deceased wife, the surviving husband is a competent witness to prove an acknowledgment from a debtor, so as to take the wife's *chose in action* out of the operation of the statute of limitations. (*o*)

Chattels real and personalty, possessed by the wife *in auter droit*, as executrix or administratrix, do not, as previously mentioned, vest in the

(*f*) 1 Roll. Abr. 242, *D. Huntley v. Griffith*, Moore, 452; Golds. 159, 160.

(*g*) *Checchi v. Powell*, 6 B. & C. 253; 9 D. & R. 243, s. c.

(*h*) *Beasmond v. Long*, Cro. Car. 208, 227. *Gabriel Miles's case*, 1 Mod. 179. *Eyres v. Coward*, Sid. 337.

(*i*) Co. Litt. 46, b. 351, a. n. (1), 19th edition, by Butler.

(*k*) *Humphrey v. Buller*, 1 Atk. 459. *Sir Geo. Sand's case*, 3 Salk. 22.

(*l*) *Betts v. Kimpton*, 2 B. & Ad. 273.

(*m*) *Fielder v. Hanger*, 3 Hag. 769. In the goods of *Pountney*, 4 Hag. 289; *Hargrave's Law Tracts*, 475.

(*n*) *Squid v. Wyn*, 1 P. W. 378. *Cart v. Rees*, cited ib. 381.

(*o*) *Hart v. Stephens*, 19 Jurist, 225.

husband by survivorship, but belong to the administrator *de bonis non* of her testator. (*p*)

In the case of personal contracts, made with both the husband and wife jointly during coverture, the husband, on the death of the wife, is of course entitled thereto by survivorship, and may, consequently, maintain an action upon any such contract in his own right.

Of the WIFE'S RIGHTS by SURVIVORSHIP.

The surviving wife is absolutely entitled to all her estates of freehold and inheritance, and to all chattels real and terms of years in land held by the husband during the coverture in her right, and remaining undisposed of, at the time of her death; (*q*) the right of action, therefore, upon all covenants annexed to such estates is, by the death of the husband, transferred to the wife.

If, during the coverture, the husband alone has granted an underlease out of the wife's term of years, reserving rent to himself, this amounts to a disposition *pro tanto* of the term, the rent becomes the sole and absolute property of the husband, and his personal representative is entitled to it at his death, although the reversion for the residue of the term remains vested in the wife; (*r*) but if the wife be made a party to the underlease, and the rent be reserved to herself and husband jointly, then she is entitled by survivorship to the rent, and to all arrears remaining due at the husband's death. (*s*) So, also, if a lease be made by husband and wife of her freehold estate, not in conformity with the statute Hen. 8, which she elects to confirm after the death of her husband, she is entitled to the rent, and to all arrears which accrued during the coverture. (*t*) The surviving wife is also entitled to all the fruits of her freehold estate "fallen during coverture;" to all arrears of rent reserved on leases made by her for life or years before the marriage, and to all rents service, charge, or seek, of which she was seized *dum sola*, or of which the husband was seized in her right, (*u*) or of which she and her husband were seized jointly, during the coverture; (*x*) and she may, after the death of her husband, maintain an action of debt in her own right to recover them. "The principal which survives to her carries with it all its accessories." But if the money has been actually received by a person appointed for that purpose during the coverture, it be-

(*p*) Co. Litt. 351, a.; Williams on Executors, 319, ed. 1841.

(*q*) Co. Litt. 351, a. 351, b.

(*r*) Co. Litt. 46, *Blaxton v. Heath*, Pop. 145. *Sym's case*, Cro. Eliz. 33.

(*s*) *Hale, C. J., Drew v. Bailey*, 3 Keb. 298,

300; 1 Rep. 175, 2nd. edition.

(*t*) *Baron & Feme*, 1 Roll. Abr. 350, (D.) pl. 4.

(*u*) 1 Roll. Abr. D. 350: Co. Litt. 351, a.

(*x*) *Temple v. Temple*, Cro. Eliz. 791.

comes the absolute property of the husband, being money had and received to his use; and his personal representative, therefore, and not the wife, is then the party entitled to an action for its recovery. (y)

Contracts under seal made with the wife alone, or with the husband and wife jointly during coverture.—The wife is also entitled by survivorship to all contracts under seal entered into during the coverture with herself alone, or with her husband and herself jointly. (z)

A bond, for example, entered into during coverture with the husband and wife jointly, survives to the wife, (a) but she may waive her right to the instrument, and it then becomes the obligation of the husband alone. (b) And if, after the death of the husband, she sues upon the bond as his administratrix, and not in her own right, this appears to be a sufficient election and waiver of the instrument on her part, and on her death, therefore, before judgment, the administrator *de bonis non* of the husband, and not her own personal representative, must bring an action for the money. (c) To a debt due on a joint judgment, recovered by herself and husband during the coverture, the wife is also entitled by survivorship. (d)

The surviving wife is entitled also to all promissory notes and bills of exchange made payable to her *during the coverture*, and also to all express simple contracts where the promise has been made to herself during the marriage, and the consideration to support it has moved from her. (e) A married woman being administratrix, received a sum of money in that character, and lent the same to her husband, taking in return for it the joint and several promissory notes of her husband and two other persons, payable to her with interest; the husband died, and it was held, that the note was a chose in action surviving to the wife, and that although she could not have maintained any action on the note during the lifetime of her husband, yet, that he being dead, she might sue upon it against either of the other makers. (f)

As regards all simple contracts, however, made with the wife alone, or with the husband and wife jointly, *during coverture*, the husband may elect to let his wife have the benefit of it by survivorship, or, if he thinks proper, he may take it himself. If, therefore, in his lifetime, he brings an action upon the contract in his own name, that amounts to an election

(y) 1 Roll. Abr. 350.

(z) *Baron et Feme*, Bro. Abr. 91 pl. 24; 1 Roll. Abr. 349, (B). Lee C. J., *Day v. Pargrave*, cited 2 M. & S. 396, 397. Parke, B., *Bendix v. Wakeman*, 12 M. & W. 98, 100.

(a) 1 Roll. Abr. 342; D. 2,—349, B. 1, *Coppin v. —*, 2 P. W. 496.

(b) 1 Roll. Abr. 349, (Y.) 1.

(c) *Norton v. Glover*, Noy's rep. 149.

(d) Com. Dig. Bar. & Feme, F. 1. *Oglander v. Baston*, 1 Vern. 396. *Bidgood v. Way*, 2 W. Bl. 1239.

(e) *Richards v. Richards*, 2 B. & Ad. 447. *Nash v. Nash*, 2 Madd. 133. *Gaters v. Madeley*, 6 M. & W. 423, ante, 338.

(f) *Richards v. Richards*, 2 B. & Ad. 447.

to take it to himself, and to an expression of dissent on his part to his wife's having any interest in it, and she cannot, consequently, in this case, take it by survivorship, but the right of action vests in the personal representative of the husband. (g) If, however, he should join his wife as a party in suing on the contract, and should in such case die after judgment, and before execution, the judgment would, as before mentioned, survive to her.

The surviving wife's right to her unrecovered choses in action.—The wife is also absolutely entitled by survivorship to all promissory notes and bills of exchange made payable to her before marriage, (h) and to all her unrecovered choses in action.

If a joint action has been commenced by the husband in the name of himself and his wife, for the purpose of recovering possession of the wife's *chose in action*, and the husband dies before judgment has been obtained, the right of action will survive to the wife, who may, by entering a suggestion of the death upon the record, prosecute the suit to judgment for her own sole use; and even if judgment has been signed in the action so commenced prior to the husband's death, but no execution levied, the benefit of the judgment will survive to the wife, and she may forthwith issue execution thereon for her own use. (i) Nothing short of a reduction of the wife's *chose in action* into actual possession can divest her right thereto, or bar her legal title by survivorship. (k)

(g) *Coppin v. —*, 2 P. Wms. 497. *Day v. Pargrave*, cited 2 M. & S. 396, 397. *Parke, B., Gaters v. Madely*, 6 M. & W. 427.

(h) *Nash v. Nash*, 2 Mad. 133. *Gaters v. Made'sy*, 6 M. & W. 423. *Sherrington v. Yates*, 12 M. & W. 855; 1 D. & L. 1032, s. c.

(i) *Sherrington v. Yates*, 12 M. & W. 865;

1 D. & L. 1041. *Gaters v. Madeley*, 6 M. & W. 427. *Bond v. Simmons*, 3 Atk. 21; anon. ib. 726. *Nanny v. Martin*, 1 ch. c. 27.

(k) Co. Litt. 351, b. *Rumsey v. George*, 1 M. & S. 180, l. *Checchi v. Powell*, 6 B. & C. 253; 9 D. & R. 244, s. c. *Hart v. Stephens*, 9 Jurist, 225.

CHAPTER XIV.

OF THE PLAINTIFFS IN ACTIONS EX CONTRACTU, WHEN THERE HAS BEEN A CHANGE OF INTEREST BY DEATH.

SECTION I.—*Deeds.*—Real and personal contracts—When the heir at law ought to sue, and when the personal representative—Of the heir's right of action in respect of breaches accruing in the lifetime of the ancestor, and continuing in the time of the heir—Of the personal representative's right of action in respect of such breaches, when the ultimate damage was sustained in the lifetime of the testator—His right of action upon covenants annexed to life estates and terms of years—Also in respect of rents and rent charges—When rent shall be apportioned as between the heir and personal representative.

SECTION II.—*Simple contracts.*—The personal representative's right of action upon all simple contracts, although made concerning the realty—Bills of exchange and promissory notes payable to the deceased—Executory contracts—Contracts with the personal representatives themselves—Upon such contracts they may sue in their representative character or in their own right—Of the number of the plaintiffs when suing as executors or administrators—All must be joined as plaintiffs in actions upon contracts made with the deceased, although all have not proved the will, and some are minors—Upon contracts made with themselves, the actual parties to the contract alone should sue.

SECTION III.—*Of survivorship* amongst personal representatives, and of the *continuance of the chain of representation*—Of the right of action on the death of a sole or surviving executor or administrator—Of administration de bonis non—Of the right of action of such administrator upon contracts entered into with the previous representative—Also upon contracts entered into with a feme covert executrix, his predecessor—Of the right of a feme covert executrix to continue by will the chain of representation.

SECTION I.

REAL AND PERSONAL COVENANTS.—RIGHT OF ACTION OF THE HEIR AT LAW AND THE PERSONAL REPRESENTATIVE.

Real contracts, or covenants running with the land, annexed to an estate of inheritance, descend with the land, in case of death, to the heir at law,

and he alone can take advantage of them. (a) They pass to the heir not only without his being named in the covenant, but where the covenant is made with the covenantee and his *executors*. (b) Wherever there is a fair inference, from the structure of the covenant, that it was intended to continue in force for a longer period than the life of the covenantee, the heir may take advantage of it. (c)

The heir at law also represents his ancestor upon such personal covenants as relate to the freehold, and affect the value of the inheritance. Thus, if a man covenants with another and his heirs, to enfeoff him and his heirs of the manor of D., and will not do it, and he to whom the covenant is made die, his heir shall have a writ of covenant upon the deed. (d) If three coparceners purchase land in fee, and mutually covenant each with the other of them and her heirs, that the survivors shall convey to the heirs of such as shall die first, the heir of a deceased covenantee is the proper party to maintain an action upon the covenant, (e) the principle established being, that if the heir at law would have had the benefit of whatever would have accrued from the performance of the covenant, he shall have the damages that accrue from the non-performance.

Of the HEIR'S right of action in respect of CONTINUING BREACHES of REAL COVENANTS.—When a real contract or covenant running with the land has been broken in the lifetime of the ancestor, and the breach remains a *continuing* breach in the time of the heir at law, the latter is the only party who can maintain an action in respect thereof, if no actual damage has resulted to the personal estate of the ancestor.

The heir-at-law assigned for breach of covenant, that certain premises were out of repair, *tali die et per decem annos*, which included part of his ancestor's time. After verdict for the plaintiff, it was moved in arrest of judgment, that the breach for part of the ten years had been incurred in the ancestor's time; but per Holt, C. J., "If the premises were out of repair in the ancestor's time, and *continued* so in the time of the heir, that is a damage to the heir for which he shall have an action, and the jury must give as much damages as will put the premises into repair." (f) The plaintiff, as executrix, declared that the defendant, by deed conveying to the plaintiff's testator certain lands, covenanted with the testator that he was, at the time of the execution of the deed, seized in fee, and had a right to convey, &c., and assigned for breach that the defendant was not

(a) *Salv v. Kitchingham*, 10 Mod. 158; Touch. 175. *Winter v. D'Erreux*, 3 P. Wms. 189, n. (B.)

(b) *Lougher v. Williams*, 2 Lev. 92.

(c) *Sacheverell v. Proggart*, 2 Saund. 367, a.

(d) Fitz. N. B. 145, (c.); Touch. 175; 4 M.

& S. 191.

(e) *Wotton v. Cook*, 1 And. 55; Benl 228; Dy. 337, b.

(f) *Vivian v. Campion*, 1 Salk. 141; 2 Lord Raym. 1125, s. c.

seized in fee, and had not a right to convey, &c. Upon special demurrer, this was held ill, and that the executrix could not maintain an action for such breaches, without showing some special damage to the testator in his lifetime, as any damage that accrued after his decease would be a matter which concerned the heir. (g) As the defendant had not a good title, the covenant was broken as soon as it was made; yet as long as the heir-at-law held the land under the defective title, there was a continuing breach, the entire damage arising from which clearly resulted to the heir-at-law.

A vendor of land executed a conveyance, professing to convey an estate in fee in the land, and covenanted with the vendee and his heirs for further assurance on request; and a request was made by the vendee in his lifetime to have a fine levied by the vendor for better assuring the estate granted, but no fine was levied; in consequence whereof, the heir-at-law of the vendee, after the death of the latter, who quietly enjoyed the estate during his life, was evicted, and brought his action for the damages consequent thereon; and it was held, that as the ultimate damage had been sustained by the heir-at-law, he was the proper party to maintain the action. (h) Here, also, the breach by the request and the refusal accrued in the ancestor's lifetime, yet so long as the act covenanted to be done remained unperformed after the request made, the breach was in the nature of a continuing breach in the time of the heir-at-law. Where, however, the ancestor was himself evicted, it was held, that the eviction being to the ancestor, he could not have an heir or assignee of that land, and so the damages belonged to the executors, though not named in the covenant, and nothing descended to the heir. (i) This reason for the entire exclusion of the heir does not appear satisfactory, as we have before seen that the heir may maintain an action upon a covenant affecting the value of the inheritance, although no estate in the land actually descends to him; (k) and if the ancestor has done nothing to intercept the descent of the land to the heir, the executor might be restricted to the recovery of the damage sustained by the personal estate, through the loss of the rents and profits of the land in the lifetime of the testator, and thus leave a subject of suit entire to the heir in respect of the damage done to the inheritance. (l)

Right of action of the PERSONAL REPRESENTATIVE.—It seems, however, that when by the breach of a covenant for title the estate of the ancestor

(g) *Kingdon v. Nottle*, 1 M. & S. 355; 4 M. & S. 53.

(h) *Jones v. King*, 4 M. & S. 188; 5 Taunt. 418, s. c.

(i) *Lucy v. Levington*, 2 Lev. 26; 1 Vent. 175, s. c.

(k) *Ante*, 850. *Jones v. King*, 4 M. & S. 191.

(l) 1 M. & S. 364.

has been actually divested, the personal representative is the only party who can maintain an action upon the covenant; (*m*) and with respect to the breaches of all other real contracts not in the nature of *continuing* breaches, where the covenant having been broken is broken once for all, and the entire and ultimate damage has accrued; such damage, if it results in the time of the ancestor, survives to his personal representative, who in such case is the only party entitled to sue upon the covenant. If, therefore, a covenant to repair contained in a lease be broken, and the lease expires, the right to sue in respect of the breach cannot be transferred to a subsequent assignee of the premises, but the action must be brought in the name of the person entitled to the property on the expiration of the term. (*n*) Such must have been the case in *Morley v. Polhill*, (*o*) where the plaintiff brought an action as executor of the Bishop of Winchester, and alleged in his declaration that Brian, the predecessor of the bishop, his testator, had demised a rectory and certain lands to S. for twenty-one years, who had assigned the lease to the defendants; and that the lessee covenanted with Brian and *his successors* to repair the chancel of the church, and the barns, &c., and assigned as a breach the not repairing thereof in the life of the bishop, the plaintiff's testator, and averred that the lease *afterwards expired*, and it was held that the executor was entitled to maintain the action. If the lease, in this case, expired in the lifetime of the bishop, the plaintiff's testator, the covenant ceased, no further breach of it could be committed, the ultimate damage was then sustained, and that damage having accrued in the lifetime of the testator, it would be properly sued for by his executor. (*p*) If the lease had not then expired, the executor could not have maintained the action, except in respect of some actual damage resulting from the breach to the personal estate of his testator, inasmuch as there would be a continuing breach as long as the covenant remained in force and unfulfilled; and the succeeding bishop to George Morley would consequently, on becoming seized of the reversion, be entitled to sue the lessee upon his covenants, and to recover as much damages as would suffice to put the premises into repair; (*q*) and if the executor could sue upon the covenant, as well as the heir, or the successor, except in respect of some special damage to the personal estate of the testator, the lessee would be harassed with two actions for the breach of one and the same duty, which the law will not suffer.

(*m*) *Ellenborough, C. J., Kingdon v. Nottle*, 1 M. & S. 363.

(*n*) *Johnson v. Churchwardens of St. Peter*, 4 Ad. & Ell. 520; 6 N. & M. 115, a. c.

(*o*) 2 Vent. 56; 3 Salk. 109, a. c.

(*p*) *Morley v. Polhill*, 2 Vent. 56.

(*q*) Ante, 350, 351.

In a recent action of covenant, the declaration stated, that by an indenture made between William Lloyd (the plaintiff's testator) and Betty his wife of the first part, S. of the second part, and the defendant of the third part, a certain messuage and lands were demised to S. for the term of one year, if the said Betty should so long live, and afterwards from year to year; that S. covenanted with Lloyd and Betty his wife to keep and leave the dwelling-house in repair, and the defendant covenanted, that if S. was guilty of a breach of his covenant, he, the defendant, would, on demand, pay all costs, charges, and expenses that might accrue by reason of his default, and would moreover perform the covenant, as though he were the real and *bonâ fide* tenant; that S. entered into occupation, and Betty died in the lifetime of Lloyd; and that the premises were not kept in repair, and by reason thereof, had sustained damage to the extent of 200*l.*; and that Lloyd, the plaintiff's testator, had, by reason of the default, incurred liability to great charges and expenses, &c. The defendant pleaded, that before the demise, Lloyd and Betty his wife were seized in their demesne as of freehold in right of the said Betty for the term of her natural life, in the said messuage, lands, &c.; that they had not any further, or any other interest in the demised premises, and that Lloyd was not in his lifetime put to, nor did he incur liability to the said costs, charges, and expenses; and it was held, that the plea constituted no answer to the action, but that the plaintiff, as the executor of Lloyd, was entitled to recover the damages resulting from the breach of covenant. Here, also, the ultimate damage accrued in the lifetime of Lloyd the testator. On the death of Betty, the covenant which was annexed to her life estate was extinguished; the remainderman, who became entitled to the property upon her decease, could have maintained no action upon it; the covenant had been broken "once for all;" and as that breach, and the ultimate damage, accrued in the time of the testator Lloyd, it became part of his personal estate, and was therefore properly sued for by his executors. (*r*)

If a man covenants not to cut down certain trees growing on the land of the covenantee, and afterwards fells them in the lifetime of the latter, the personal representative is the proper party to maintain an action for the breach, as the entire damage has accrued, and the covenant has been broken "once for all" before the time of the heir-at-law. There can be no continuing breach of such a covenant, and the right of action, therefore, remains with the personal representative as part of the personal estate. (*s*.)

(*r*) *Ricketts v. Weaver*, 13 Law J., N. S. W. 134.
(Exch.) 195. *Wootton v. Sheffenoni*, 12 M. &

(*s*) *Raymond v. Fitch*, 2 C. M. & R. 588.

If a man enters into a covenant with the testator to discharge the testator's land from incumbrances, the executor is the proper party to maintain an action to recover damages for whatever breaches are committed in the lifetime of the testator, such breaches constituting separate and distinct causes of action, and operating as a direct injury to the personal estate. (u) So, with regard to the breaches of a covenant to pay rent, although the covenant when annexed to an estate of inheritance descends with the land to the heir at law, yet all the arrearages that have accrued up to the death of the ancestor, are only to be sued for by the personal representative. In these cases each breach is entire, giving a separate and distinct right of action, and although the covenant is transferred with the estate, yet it is not so with the breaches and consequent right of action that have previously accrued. (x)

Covenants annexed to life estates and terms of years.—If an estate is holden during the life of another, and the grantee or assignee of such estate dies in the lifetime of *cestui que vie*, the estate will pass to the heir at law, or the personal representatives of the grantee *pur autre vie*, according as he or they may or may not be named in the deed or instrument of conveyance. If the estate *pur autre vie* is limited to the grantee or lessee and his heirs, the heir will take as special occupant on the death of the grantee living *cestui que vie*, because he is included by name in the grant. (y) If on the other hand the estate be limited to the grantee, and his executors, the personal representative will take, for, though it be a freehold, which by the common law would not go to executors, yet they may be designated by name, so as to take as special occupants. (z) And now, if the estate be granted or assigned to the party generally, without words of limitation, the personal representative will take the estate by force of the statute, (a) and be entitled to the benefit of the performance of all covenants annexed thereto. If the owner of an estate *pur autre vie* which has been granted to him, his heirs and assigns, bequeaths the estate to A., and his assigns, and A. dies intestate in the lifetime of *cestui que vie*, the premises will pass to A.'s personal representative under the statute, and not to his heir at law. (b)

All real contracts or covenants running with the land, annexed to reversions for terms of years, leases and chattel interests in land, pass of

(u) *Smith v. Simonds*, Comb. 64.

(x) *Madgley v. Lovelace*, Carth. 289.

(y) Bac. Abr. *Estates for life and occupancy*, B. 3. *Doe v. Robinson*, 8 B. & C. 296; 2 M. & R. 249, s. c.

(z) Bac. Abr. *Estates for life and occupancy*,

B. 3.

(a) 29 Car. 2, c. 3, s. 12; 1 Vict. c. 26, ss. 28, 6.

(b) *Doe v. Lewis*, 9 M. & W. 662. 1 Vict. c. 26, s. 6, post. 356.

course together with the estates to which they are annexed to the personal representatives of the deceased covenantor. (c) No mere words of limitation can vary the course of succession of a chattel interest. If a lease for years be made to a man and his *heirs*, or a term of years be limited to him and the heirs of his body, or the heirs male of his body, it will go to his *executors*. (d) So, if a lease for years be granted to a bishop, parson, or other *sole* corporation, and his successors, it passes, on the death of the lessee, to his personal representatives, and not to his successors; succession in a body politic being as an inheritance in the case of a body private. (e) No estate of freehold can be created out of a term for years. If, therefore, a lessee for years makes a lease for life, it is a chattel interest. (f) If a person holds lands as tenant by statute merchant, statute staple, or elegit, he also has a chattel interest only, which passes to his personal representative. (g) Whatever covenants, therefore, are annexed to such estates and interests in the land pass to the personal representative as the assignee in law of the covenantor, and he alone can maintain an action upon them.

Rents and rent charges. — Rent annexed to a reversion, follows the reversion to which it is incident, and goes either to the heir at law or to the executor, according as the reversion may be an estate of inheritance or a chattel interest. All rents reserved by lessees on under-leases made by them, pass with the reversion of the original term to the personal representative, although the rent may be reserved to the lessee and his *heirs* during the term, without mentioning the executors; (h) and if a man, seized of one acre in land in fee, and possessed of another acre for a term of years, makes a lease of both, reserving rent, and dies, the rent shall be apportioned with the reversion, and the heir at law and the executor, shall each have his proportion of the rent. (i) And now, when the entire reversion passes to the heir, the rent incident to such reversion is apportionable between the heir and the personal representative, so that the latter shall have the proportion that was earned in the lifetime of his testator. (k)

When, however, a rent, payable for a term of years has been severed from the reversion, it will pass to the personal representative and not to the heir at law. If a man, for example, seized of land in fee, makes a

(c) Co. Litt. 46, b., 388, a.
 (d) *Leonard Lovie's case*, 10 Co. 87 (b).
Leventhorpe v. Ashbre, 1 Roll. Abr. 611.
 (e) *Fulwood's case*, 4 Co. 65, a.
 (f) *Butt's case*, 7 Co. 23, a.
 (g) Co. Litt. 42, a; 2 Saund. 68; 2 Inst.

396.
 (h) *Sackeverell v. Froggart*, 2 Saund. 368—
 371; 1 Vent. 161.
 (i) Gilb. Rents, 188.
 (k) 3 & 4 Wm. 4, c. 22.

lease for years reserving rent, and afterwards devises the rent to a stranger, and dies, and the stranger is seized of this rent and dies, his personal representative shall have the rent, and not his heirs. (l)

If rent is granted to a person generally, without words of limitation, the rent is a freehold rent, payable during the life of the grantor, and if the latter assigns this rent, and the assignee thereof dies in the lifetime of the *cestui que vie*, the rent will now pass by force of the statutes to the personal representatives of the assignee. By the common law, if rent was granted to A., during the life of B., and the grantee died, living B., the rent was determined, and the grant ceased, and became void. (m) But if the rent was granted to A., and his heirs nominatim, the heir at law of the grantee took the rent *pur autre vie*, as a special occupant expressly named and designated in the deed. (n) The personal representatives, however, could not by the common law take the rent as special occupants, although included in the words of the grant; and if a rent *pur autre vie* was granted to a man and his executors by name, and the grantee died in the lifetime of *cestui que vie*, the rent was determined and the grant ceased. (o) To put an end to this anomaly, and the legal niceties by which it was supported, and to preserve and continue estates for life, and facilitate their transfer from one person to another, it has been enacted that estates *pur autre vie* shall be devisable by will, and that if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by special occupancy, as assets by descent; and in case there shall be no special occupant of any estate *pur autre vie*, whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of the act, it shall be assets in his hands. (p) All estates *pur autre vie* in rents, as well as in lands or tenements, will consequently, by force of the statute, pass to the personal representative of the grantee, when the heir is not expressly named in the grant, (q) and they may maintain an action of debt for its recovery. (r)

(l) *Knolle's case*, Dyer, 5, B. *Jenison v. Lord Lexington*, 1 P. Wms. 555.

(m) *Holden v. Smallbrooke*, Vaughan, 199. *Tindal, C. J., Bearpark v. Hutchinson*, 4 M. & P. 858. Bac. Abr. (*Estate for life and occupancy*, B. 1.)

(n) Co. Litt. 888, a. Willes, C. J., *Hassell v. Gouthwaite*, Willes, 505.

(o) 2 Boll. Abr. 151.

(p) 1 Vict. c. 26, s. 6, repealing 29 Car. 2,

c. 3, s. 12. The new act, however, is not to extend to any estate *pur autre vie* of any person who died before the 1st of January, 1838.

(q) *Bearpark v. Hutchinson*, 4 M. & P. 860; 7 Bing. 176, a. c. *Doe v. Lewis*, 9 M. & W. 664. *Rawlinson v. Duchess of Montagu*, 3 P. Wms. 264, n. *Ripley v. Waterworth*, 7 Ves. 437, 442.

(r) *Turner v. Lee*, Cro. Car. 471. *Brown v. Pendlebury*, Cro. Eliz. 268. *Pilton v. Darby*,

By the common law, when a tenant for life made a lease reserving rent, and died between two rent days, the rent growing due was lost both to the executor of the lessor, and also to the remainder-man. This defect has now been remedied by statute, and the rent is made apportionable between the personal representative of the lessor and the party entitled in remainder. (*s*)

If a lord of a manor assesses a fine on a copyholder, for admittance, and dies before the fine is paid, his executor may bring an action for its recovery, for it is a fruit fallen, and shall not go with the inheritance to the heir. (*t*)

Bonds and personal covenants and choses in action.—Every right of action *ex contractu*, which the testator or intestate possessed at the time of his decease, is transmitted to the executor or administrator, who is alone entitled to sue upon bonds and personal covenants and contracts under seal, made or entered into with the testator or intestate, and to recover debts of record due to him, such as judgments, statutes, or recognizances, or debts due on specialties. (*u*) And so completely does the executor or administrator represent the testator or intestate, in respect of his personal contracts, that no words of limitation introduced into them, can take away his exclusive right of action founded upon such representation. If one man, for example, covenants to pay money to another, his *heirs* or executors, the executors only are entitled to sue upon the covenant. If a bond or other personal obligation under seal, be made to a man and his *heirs*, the executor or administrator is the only party who can maintain an action upon the instrument. (*x*)

If the deceased in his life time has assigned a bond or other *chose in action* not assignable in law, so as to transfer the equitable interest to the assignee, the action upon the instrument must nevertheless be brought in the name of the personal representative of the deceased assignor, in whom the naked legal title continues to be vested. (*y*)

CONTRACTS UNDER SEAL with the personal representative.—If the executor or administrator takes a bond or contract under seal in his representative character, this is an obligation strictly personal to himself upon which he can recover only in his own right. (*z*) But if he does sue

Comb. 57. Gilbert on Rents, tit. DEBT. 32 H. 8. c. 37. Bac. Abr. RENT, K. 6.

(*s*) 11 Geo. 2, c. 19; 4 W. 4, c. 22.

(*t*) *Shuttleworth v. Garret*, 1 Show, 35; Carth. 90, 3 Lev. 261.

(*u*) Com. Dig. Administration (B. 13), Vin. Abr. Executors. *Carr v. Roberts*, 5 B. & Ad.

84. *Chapman v. Dalton*, Plowd. 285; Went. off. ex. 14th ed. 188.

(*x*) *Devon v. Paulett*, 11 Vin. Abr. 133, pl. 27.

(*y*) *Brandt v. Heatig*, 2 Moore, 186.

(*z*) *Hosier v. Lord Arundel*, 3 B. & P. 7.

as executor, having a good cause of action in his own right, the words "*as executor*" may be rejected as surplusage, and he can recover in his individual capacity. (a)

Upon a judgment recovered by an executor or administrator in his representative capacity, he may maintain an action in his own right. (b)

Some contracts under seal are however absolutely determined and put an end to by the death of one of the contracting parties. (c)

If a bond be conditioned to pay money to such person as the testator shall by will appoint, and the testator makes no express appointment, the contract to pay the money is at an end, and the personal representative has no claim whatever thereto, as he is not the appointee contemplated by the bond. (d)

SECTION II.

SIMPLE CONTRACTS—RIGHT OF ACTION OF EXECUTORS AND ADMINISTRATORS.

Simple contracts concerning REALTY.—The executor or administrator being the only representative recognised by law in respect of the personalties of the deceased, is the only party who can maintain action upon simple or parol contracts entered into with the testator or intestate, whether they be or be not made concerning land. Thus, where the plaintiff as administrator declared in assumpsit that the intestate had retained the defendant as his attorney, to investigate and procure a good title to an estate about to be conveyed to the intestate as purchaser, and assigned for breach that the defendant did not do so, but accepted a bad and defective title by means whereof the intestate in his life time was unable to sell the estate, and also sustained divers expenses, &c. It was held on demurrer that the administrator was the proper party to maintain the

(a) *Dembyn v. Browne*, Moore, 887. *Browne v. Dunnery*, Hob. 208. *Hornsey v. Dimocke*, Vent. 119.

(b) *Cranford v. Whittal*, 1 Doug. 4, n. 1. *Bonifous v. Walker*, 2 T. R. 128.

(c) *Barford v. Stuckey*, 8 Moore, 100; 1 Bing. 225, s. c. *Neal v. Hanbury*, Prec. Ch. 173.

(d) *Pease v. Mead*, Hob. 9.

action. (a) So, where the plaintiff as administratrix brought an action against the defendant for not making out a good title to an estate, pursuant to a contract of sale entered into between the defendant and the intestate, whereby the latter was put to divers expenses, and lost all the profits which he would have acquired from employing the money paid as a deposit, &c. And it was held that the action was properly brought by the administratrix. (b)

Bills of exchange and promissory notes.—The right of action upon all bills of exchange and promissory notes and negotiable securities, payable to the testator or intestate, is transferred to his executor or administrator.

The law raises no implied promise to the personal representative in respect of a promissory note given to the deceased. The executor or administrator must sue upon the express promise to the latter, evidenced by the note itself, and the proof of such promise will establish his right of action, and entitle him to recover the amount promised to be paid. (c)

An agent abroad having money belonging to his principal in his hands, purchased a bill of exchange, and indorsed it specially to his principal, with a view of remitting him the amount. At the time of the indorsement of the bill, the principal was dead, but that fact was not known to the agent; and it was held, that as the money, in respect of which the bill was remitted, belonged to the principal, it was competent to his administrator to sue upon the bill in his representative capacity. (d)

Executory contracts.—The personal representative is entitled to the benefit of all such of the executory contracts of the deceased as he can fairly and efficiently fulfil. If a coat is ordered of a tailor, and the tailor dies, leaving the coat unfinished, the personal representative may complete the garment, and maintain an action for the price. If a man engages to build a house, and procures all the necessary materials, his personal representatives, in case of his death, may complete the work and sue for the agreed remuneration; and “if a man builds half a house, or makes half a wheelbarrow, or half a pair of shoes, and dies, the executors may complete them.” (e)

When the contract, however, is purely of a personal nature, founded upon the known skill of the deceased, or his peculiar talents and intellectual capabilities and acquirements, it is determined by his death. If a

(a) *Knights v. Quarles*, 4 Moore, 532.

(b) *Orme v. Broughton*, 10 Bing. 533; 4 Moore & Scott, 417, a. c.

(c) *Timmis v. Platt*, 2 M. & W. 720.

Slater v. Lawson, 1 B. & Ad. 895.

(d) *Murray v. East India Company*, 5 B. & A. 216.

(e) *Werner v. Humphreys*, 3 Sc. N. R. 226.

publisher, for example, agrees to pay some celebrated poet, or author, a fixed sum of money for a poem or treatise of a certain number of pages, and the writer dies before he has completed his task, the contract is absolutely determined, and the publisher is not bound to pay any part of the stipulated remuneration, unless he has accepted and used some portion of the work, in which case he would be liable upon the ordinary implied promise in respect of a benefit actually received.

Contracts of apprenticeship, founded upon personal instruction on the one side, and the render of work and service on the other, are in like manner discharged and put an end to by the death of either party; but if they are founded on support and maintenance on the one hand, and the performance of work on the other, they continue in force notwithstanding the death of the master. (*f*) Most contracts of this description are, however, regulated by statute, or by the custom of trade in particular districts. (*g*)

CONTRACTS WITH THE PERSONAL REPRESENTATIVES THEMSELVES.

If the personal representatives, in the course of their administration, have themselves entered into simple contracts upon which a right of action has accrued, they may, if the damages or debts when recovered will be assets in their hands, sue in their representative capacity, or they may, as the actual parties to such contracts, sue in their own right, not naming themselves executors.

Bills of exchange and promissory notes made payable to the PERSONAL REPRESENTATIVES.—The personal representatives may maintain an action in their representative character upon all negotiable securities which have been indorsed or made payable to them as executors or administrators. Thus, where the payee of a bill of exchange indorsed it to A. and B. as executors, it was held that they might declare as such in an action against the acceptor. (*h*) So, where a promissory note was made payable to an administrator as administrator, it was held that, he might sue upon it in his representative character, (*i*) and it now seems fully established by the more recent decisions, that if the bill or note be indorsed generally, or be made payable to the executor or administrator individually, yet if the amount when recovered will be assets in his hands, he may sue in his representative character upon the instrument. (*k*)

(*f*) *Baxter v. Burfield*, 1 Str. 1266. *The King v. Peck*, 1 Salk. 65. *Wadsworth v. Guy*, 1 Sid. 216. *Walker v. Hull*, 1 Lev. 177. *Jackson v. Bridge*, 12 Mod. 651.

(*g*) As to parish and other apprentices, see 32 Geo. 3, c. 57, and the Index to the Statutes.

(*h*) *King v. Thom*, 1 T. R. 487

(*i*) *Partridge v. Court*, 5 Pr. 412; 7 Pr. 591, s. c. in error.

(*k*) *Cowell v. Watts*, 6 East, 409. *Aspinall v. Wake*, 10 Bing. 55; 3 M. & Sc. 433. *Catherwood v. Chaband*, 2 D. & R. 274, 276. *Heath v. Chilton*, 13 Law J., N. S. (Exch.) 228.

If executors or administrators by mistake pay away the money, or if they sell the goods of their testator, (*l*) or carry on his business for the benefit of his personal estate, and for the purpose of winding up his affairs, and enter into contracts in so doing, they may sue either in their representative character, (*m*) or in their individual character not naming themselves executors. (*n*) They should, however, upon such contracts sue in their representative character in order to protect the assets from a set-off in respect of their individual debts. (*o*)

Of the number of the plaintiffs when suing as executors or administrators.—As the executors unitedly represent the person of the testator, they must all be made plaintiffs in actions brought upon contracts entered into with the deceased, although some of them be infants under the age of seventeen years, (*p*) or have not proved the will, or have refused before the ordinary to prove the will, (*q*) or have expressly renounced probate; (*r*) for the party is at liberty, notwithstanding the renunciation, to accept the executorship, (*s*) and the executors do not derive their title from the probate, but from the will, and the probate having been granted to one (*t*) enures to the benefit of all.

Upon contracts which have been entered into with the personal representatives themselves in the course of their administration, all must be joined if the contract has been made on behalf of all; but if the contract has been entered into by one or more of them individually without the interference of the rest, then those only who were the actual parties to such contract should be made plaintiffs. If, for example, a contract is entered into by one of several executors generally, on account of the estate or on account of themselves and their co-executor, a joint action by all may be brought; but if the acting executors made the contract on their own account only, they alone intending to administer the assets without their co-executor, then the action should be brought by the executors who have so contracted. (*u*)

Three out of four executors undertook the management of the testator's

(*l*) *Clark v. Hougham*, 3 D. & R. 328; 2 B. & C. 149, s. c. *Cowell v. Watts*, 6 East, 405. *Ord v. Fenwick*, ib. 109. *Dowbiggin v. Harrison*, 9 B. & C. 669.

(*m*) *Aspinall v. Wake*, 3 M. & Sc. 423; 10 Bing. 51, s. c. *Marshall v. Broadhurst*, 1 Cr. & Jerv. 405; 1 Tyr. 348, s. c. *Werner v. Humphreys*, 3 Sc. N. R. 226.

(*n*) *Grissell v. Robinson*, 3 Sc. 329; 3 Bing. N. S., 10 s. c.

(*o*) *Clark v. Hougham*, 2 B. & C. 155, per

Bayley, J.

(*p*) *Smith v. Smith*, Yelv. 130. *Forrest v. Tremaine*, 2 Saund. 212. *Coan v. Bowles*, Carth. 122.

(*q*) *Hensloe's case*, 9 Co. 36 (b).

(*r*) *Creswick v. Woodhead*, 5 Sc. N. R. 778.

(*s*) *Robinson v. Bett*, 3 P. Wms. 248.

(*t*) Bayley, J., *Webster v. Spencer*, 3 B. & A. 363. *Wankford v. Wankford*, 1 Salk. 307.

(*u*) *Heath v. Chilton*, 13 Law J., N. S. Exch. 228.

concerns, and possessed themselves of his property, they directed an auctioneer to sell certain portions of the estate, and sued for the price without joining the fourth; and it was held that the action was well brought by the three who had authorised the sale, and were the actual parties to the contract. (x)

The title of an administrator to the effects and personal estate of the deceased, though it does not exist until the grant of administration relates back to the time of the death, so as to entitle the administrator to sue upon an implied contract of sale in respect of goods delivered to, and received by a party before the grant of the letters of administration. And if an agent sells goods in ignorance of the death of the principal, the administrator may adopt the contract, and sue upon it in his representative character as soon as he has obtained letters of administration. (y)

ADMINISTRATION *cum testamento annexo*.—When administration with the will annexed is granted to a person as the attorney of, and for the benefit of an absent executor, such person is the legal representative of the testator during the life of the executor, or until the executor himself takes out probate. All rights of action consequently accruing in right of the testator, or in respect of his personal estate, vest in the attorney or agent so appointed, and not in the executor. (z)

SECTION III.

OF SURVIVORSHIP AMONGST PERSONAL REPRESENTATIVES, AND OF THE CONTINUANCE OF THE CHAIN OF REPRESENTATION.

Survivorship amongst executors.—On the death of one of several executors, either before or after probate, the entire right of representation survives to the others. When such surviving executor, or when a sole executor dies after probate, his executor and the executor of such executor is in law the executor of the first testator, and as such is entitled to sue

(x) *Brassington v Ault*, 9 Moore, 843; 2 Bing. 177, a. c. *Ashurst, J., Evans v. Mann*, 2 Cowp. 570.

(y) *Foster v. Bates*, 12 M. & W. 226; 13

Law J., N. S. R. 88, a. c.

(z) *Sundercrop v. Day*, 8 Ad. & E. 624; 3 N. & P. 871, a. c.

upon all contracts entered into with him. If, therefore, one of two executors makes his will, appoints his executor, and dies, and then the other dies intestate, the executor of him who died first cannot be executor to the first testator, but administration of the goods of the first testator with the will annexed must be committed. (a) A. granted a lease for twenty-one years, and covenanted with the lessee and his assigns to make to him and his assigns a further lease for twenty-one years, to commence after the date of the first term; the lessee made his executrix and died, and the executrix made her executor and died. The first term expired, and it was held that the executor of the executrix, being executor to the first testator, might have an action of covenant for the second lease. (b) And an administrator *durante minore etate* of the executor of an executor is the representative of the first testator, for such an administrator stands *loco executoris*, and in a different position from the mere administrator of an administrator. (c) But when the sole or surviving executor dies *before* probate of the will has been granted, his executor cannot be made executor to the first testator, inasmuch as he cannot prove the will of the first testator, and is consequently incapable of recovering his debts. (d) Administration of the goods and chattels of the first testator with the will annexed, therefore, must be committed. If one of several executors alone proves the will, the rest renouncing before the ordinary, the right of representation is not, in case of the death of him who has proved, transmitted to his executors, but it survives to the co-executors, who may, notwithstanding their renunciation, forthwith take upon themselves the execution of the will; (e) but if they all still refuse, then administration *de bonis non*, with the will annexed, must be obtained.

On the death of an administrator, or of a sole, or surviving executor after probate, intestate, no interest or right of representation is transmitted to his administrator.

The administratrix of an executor brought an action under 4 Geo. 2, c. 28, against a tenant, for double the yearly value of lands, for holding over after notice to quit, under a demise from the testator; and it was held that she could not maintain the action, although the tenant had attorned to her, without first taking out administration *de bonis non*. (f) By the

(a) *Wankford v. Wankford*, 1 Salk. 299—303.

(b) *Chapman v. Dalton*, Plowd. 285.

(c) Anon 1, Freem. 287, *Norton v. Molineux*, Hob. 246. *Limmer v. Every*, 4 Leon. 58; contra *Cro. Eliz.* 211. s. c.

(d) *Wankford v. Wankford*, 1 Salk. 308.

(e) *House v. Lord Petre*, 1 Salk. 311. *Rex v. Simpson*, 3 Burr. 1463.

(f) *Tingrey v. Brown*, 1 B. & P. 310. *Elliott v. Kemp*, 7 M. & W. 311.

grant of such administration, the administrator *de bonis non* becomes the only personal representative of the original deceased, and he is clothed with all the legal rights which belonged to the former executor or administrator in his representative character. If, therefore, a promise has been made to the former administrator, upon which he might have sued *as administrator*, the right of action thereon devolves upon the administrator *de bonis non*. (g) So, if a bill of exchange be indorsed generally, but be delivered to an administratrix *as administratrix*, in payment of a debt due to the intestate, the administrator *de bonis non*, and not the personal representative of the administratrix, is the proper party to maintain an action upon the bill. (h)

It has been held, however, in an old case, that if an administrator receive part of a debt, being rent in arrear due to the intestate, and take a promissory note payable to himself personally for the residue, this is such an alteration of the property as vests it in the administrator himself, and therefore that, on his death, his own personal representative, and not the administrator *de bonis non*, is entitled to the note. (i) Consistently with more recent decisions, however, it could now hardly be held that the taking of such a note by a man in his character of administrator, as a further security for a debt due to the estate of the intestate, would be an absolute conversion of the debt to his own use, so as to render him liable for a *devastavit*, and if not, the note so received would still be assets in his hands, he might sue in his representative capacity upon it, and it would consequently go to the administrator *de bonis non*, as the personal representative of the original intestate, and not to his own executor or administrator. (k) If, however, the administrator should take a bond or other obligation under seal, payable to himself personally, this would be an absolute conversion to his own use of the property, and his own personal representative, and not the administrator *de bonis non*, must bring the action upon such new security. If, for example, an executor takes a bond in his own name for a debt due by simple contract to the testator, thereby extinguishing the old right, and creating a new debt of a higher nature to himself personally, this amounts to a *devastavit*, and shall charge him at once as if he had actually received the money. (l) He can no longer sue for the debt in his representative capacity, and it no longer remains assets in his hands. If,

(g) *Hirst v. Smith*, 7 T. R. 182.

(h) *Catherwood v. Chaband*, 2 D. & R. 271;
1 B. & C. 150.

(i) *Barker v. Talbot*, 1 Vern. 474.

(k) *Catherwood v. Chaband*, 2 D. & R. 271.

(l) *Norden v. Levi*, 2 Lev. 189.

therefore, he dies intestate, the administrator *de bonis non* can take no interest in it, and can maintain no action for its recovery. (*m*)

Where an administrator, being possessed of a term for ninety-nine years in his representative capacity, made an underlease reserving rent to himself individually, which the underlessee covenanted to pay to him, his executors, &c. ; it was held, that the executor of the administrator, and not the administrator *de bonis non* was the proper party to maintain an action upon the covenant. (*n*)

In an action brought to recover a sum of money, being the interest of a debt due to a deceased testator, the plaintiff declared as administrator with the will annexed of the goods left unadministered by K., the executor, who was alleged to have proved the will by his attorney, to whom administration with the will annexed was granted, for the benefit of K., which K., since deceased, left H. his executor ; whereupon, administration with the will annexed was granted to the plaintiff, for the benefit of H., and that the defendants were indebted to the plaintiff, as administrator of the original testator, for interest for money owing from the defendant to the plaintiff, as administrator as aforesaid, and that the defendant promised the plaintiff, as such administrator, to pay him the amount ; and it was held, that the original grant of administration to K.'s attorney was at an end on the death of K., and that the second grant to the plaintiff, consequently, was good, and that he was entitled to recover the interest. (*o*)

When administration has been granted to two persons, and one dies, the survivor will be sole administrator ; (*p*) and as the administrator has no interest or right of representation but what he derives from the act of the ordinary, he can in no case continue the trust reposed in him to his own executor.

Feme covert executrix.—If a feme executrix marries, and the husband and wife bring a joint action of debt upon an obligation in right of the wife as executrix, and recover judgment, and immediately afterwards the wife dies, the husband cannot, as previously mentioned, sue out execution thereon, (*q*) but the succeeding executor, or the administrator *de bonis non*, as the party entitled to the money, must commence a new action, (*r*) unless the judgment be after verdict, in which case, by statute 17 Car. 2, c. 28, the administrator *de bonis non* may sue out a scire facias, and take execu-

(*m*) *Drue v. Bayly*, 3 Keb. 298, 427, 463, 495, 549 ; 2 Lev. 100, s. c.

(*n*) *Ib.*

(*o*) *Sewerrop v. Day*, 3 N. & P. 670 ; 8 Ad. & E. 624.

(*p*) *Adams v. Buckland*, 2 Vern. 514.

(*q*) 1 Roll. Abr. 889 ; *W. Jones*, 248 ; Cro. Car. 298.

(*r*) *Yates v. Gough*, Yelv. 33 ; 2 Saund. 149.

tion thereon; and he may also, within the equity of the act, perfect an execution already begun. (s)

A feme covert executrix may, notwithstanding her coverture, by will appoint her executor, so as to continue the chain of representation. (t) A widow being executrix to her first husband, married again, and, during the coverture, made a will simply in execution of a power given her by her second marriage settlement, and appointed her executrix, to whom probate was granted in the usual form. It was held, that the last-mentioned executrix was, on the death of the widow, the personal representative of the first husband. (u)

(s) *Clerk v. Withers*, 1 Salk. 322; 2 Ld. Raym. 1072, s. c.; 1 Jac. 2, c. 17.

(t) *Scammell v. Wilkinson*, 2 East, 551.

(u) *Barr v. Carter*, 2 Cox, 429.

CHAPTER XV.

LIABILITIES EX CONTRACTU.

SECTION I.—Deeds.—Liability of a covenantor who has not been made a party to a deed, but who seals and delivers it—Covenants and obligations by one person on behalf of another—Liability of a covenantor acting on behalf of the crown—Ascertainment and identification of the covenantor or obligor—Covenants in assumed and adopted names—Covenants by partners in the trading name of their firm.

SECTION II.—Simple contracts.—Ascertainment of the party to be charged upon simple contracts—Admissibility of oral evidence to shift the liability from an agent to his principal—Subsequent ratification of a written contract by a principal rendering him responsible upon it—Of the liability upon bills of exchange, promissory notes, and money orders signed by one person on behalf of another—Agreements entered into by agents in their own names—Agreements and undertakings expressed to be made by one person on behalf of another—Contracts by persons describing themselves as commissioners of public works, trustees, executors, &c.—Liabilities *ex contractu* of managing committees of clubs, eleemosynary, and charitable institutions, &c.—Contracts of parish officers, churchwardens, overseers, and vestrymen.

SECTION I.

LIABILITIES UPON CONTRACTS UNDER SEAL. (a.)

DEEDS *inter partes*.—Although a person not made a party to certain deeds *inter partes* cannot by the common law, as previously mentioned, (ante, 241,) take advantage thereof by way of action, and sue upon covenants entered into with him by one who is not a party thereto, yet he may render himself liable to be sued thereon by sealing and delivering the deed; for “one who is no party to a deed may covenant with another who is a party, and thereby be bound he may oblige himself by the deed if there be express words to it, and the deed be sealed by him.” (b)

Covenants and obligations by one person on behalf of another.—But

(a) As to the right of action upon deeds, and the parties to be made plaintiffs in such actions, see ante, 238.

(b) Holt, C. J., *Salter v. Kidegley*, Holt, 210; Carth. 76, s. c.; 1 Show, 56, s. c.

the liability, in the case of deeds, is always confined to the person with whom the contract is in express terms made, and does not extend to the person on whose behalf, and for whose benefit, it is expressed to be made. We have already seen that such a person has no right of action thereon (ante, 242, 256); his inability to sue, therefore, is naturally followed by a corresponding exemption from liability. If an individual in a private capacity, not acting on behalf of the government, covenants in his own name under his own hand and seal for the act of another, he is personally bound by his covenant, although he describes himself in the deed as covenanting "for and on the part and behalf" of such other person; for "a man may bind himself for the act of another, and to pay out of a fund not his own, and will be liable in either case."

By certain articles of agreement under seal, made between the plaintiff of the one part, and the defendant for and on the part and behalf of the Right Honourable Lord Viscount Rokeby of the other part, the defendant, for himself, his heirs, executors, &c., on the part and behalf of the said Lord Viscount Rokeby, did covenant with the plaintiff that Lord Viscount Rokeby, his heirs, &c., should pay to the plaintiff 8,000*l.*, and the court said that it was impossible to contend, that where one covenants in his own name for another, he is not to be bound by his covenant; that there was nothing unusual or inconsistent in the nature of the thing that one should covenant with another, that a third party should do a certain thing, as that he should go to Rome; that the party with whom the covenant was made might prefer the security and liability of the covenantor to that of the third party, who was to do the act stipulated to be done, and if the defendant covenanted in his own name, and put his own seal to the deed, he gave his own personal security and liability for the performance of the contract. (c)

In an action of debt upon a bond the condition appeared to be that G. F., acting on behalf of J. F., should submit to and abide by the award of certain arbitrators touching divers disputes and differences between the plaintiff and J. F.; and it was held that G. F. was personally bound by this submission, though it was not made on his account, but for and on behalf of another. (d)

In an action of debt upon a deed poll, it appeared that the defendant had sealed and delivered a written instrument to the effect following:—
"Memorandum.—that I have received of Edward Talbot, (the plaintiff's testator,) to the use of my master, Mr. Serjeant Gawdy, the sum of 40*l.*,

(c) *Appleton v. Binks*, 5 East, 148; *Tindal*, C. J., 14 Law J., N. S. (Q. B.) 228.

(d) *Cayhill v. Fitzgerald*, 1 Wils. 28, 58. *Bacon v. Dubarry*, 1 Id. Raym. 246.

to be paid at Michaelmas next: and it was held that the defendant was personally liable for the repayment of the money, although it was expressed to be received by him for another's use; but if the defendant, in the clause of repayment, had said "to be repaid by my master," he would not have been chargeable upon the instrument. (e)

Covenants by directors, trustees, commissioners, &c.—In an action of covenant on articles of agreement under seal, made between the plaintiffs of the one part, and the defendants, directors of a mining company, of the other part, the agreement as set forth recited that the defendants had been chosen to act as directors of the company, and as such directors they had agreed with the plaintiffs to purchase the East Downs mines at the sum of 4,500*l.*, "to be paid and payable out of the monies to be raised by the said company." And the said directors parties thereto did thereby promise and agree that out of the said payments so to be made by the shareholders of the company they would pay to the plaintiffs the said sum of 4,500*l.* And it was held that the directors were personally responsible upon the agreement for the payment of the money. (f)

Of the liability of COVENANTORS acting on behalf of the CROWN.—When upon the face of a contract under seal it appears that the covenantor is an officer acting in a public capacity in discharge of his duty to the crown or the country, he is not personally liable for the performance of the contract unless he gives his own undertaking, and it plainly appears to have been the intention of the contracting parties that he should himself be responsible for the performance of the act covenanted to be done.

A captain in the navy chartered a vessel, on account of government, to be employed in the public service in the conveyance of French prisoners of war from St. Helena to a French port, and by the charter party of affreightment under seal, expressed to be made between him by the name and description of "Captain Wolseley, commander of his Majesty's ship *Magnanime*, and senior officer of his Majesty's ships at St. Helena, (there being no commissary for prisoners there,) on account of his Majesty of the one part," and the plaintiff, described as "one of the agents of his Majesty's ship *Hannibal* of the other part;" it was agreed that the prize ship, *Le Sevière*, should "be employed as a cartel to carry the French prisoners taken by the *Hannibal* to the first port in France;" that the defendant, "on account of the king," should put on board a commis-

(e) *Talbot v. Godbolt*, *Yelv.* 137; 5 B. Abr. 372.

(f) *Hancock v. Hodgson*, 12 Moore, 504; 4 Bing. 269, *a. c.*

sion officer to command her, and a midshipman to assist him; that if any accident should happen to the said cartel, "*government* should be answerable;" and that "the passage of the prisoners" should be settled by the principal officers and commissioners of his Majesty's navy, as they, in justice to the captors, should think meet, and at such rate as had been usual in similar cases; and that if any provisions should remain at the end of the service, restitution should be made to government for the same, and that the value should be deducted out of such bills as might be granted for that vessel's service." The voyage having been performed, and the prisoners carried to Port l'Orient, the plaintiff brought an action against the defendant, Captain Wolsley, for the freight; but it was held that it plainly appeared upon the face of the deed that the government and not Captain Wolsley was to be answerable for the payment of the freight, and the performance of the contract; that the defendant appeared throughout to be acting in discharge of his duty as a public officer and servant of the government, and intending to guard himself from personal responsibility by stipulating that "*government* should be answerable," and that it would be detrimental to the public service to hold that governors and commanders-in-chief were personally responsible upon contracts entered into by them in the execution of their duty, unless the intention of the contracting parties that they should be so liable was plainly manifested upon the face of the contract. (g)

ASCERTAINMENT *and* IDENTIFICATION *of the* COVENANTOR *or* OBLIGOR.—In all contracts, under seal, there must be some *designatio persone* or description of the contracting party. Generally speaking the name of the covenantor or obligor appears in the body of the deed, but there is a sufficient designation and description of the party to be charged if the name is written at the foot of the instrument.

A deed alleged to have been made between the plaintiff and the defendant began as follows:—"Tis agreed that a grey nag bought of J. S. by Mr. Frampton shall run twenty-five miles in two hours for £—&c. In witness whereof we have set our hands and seals." The plaintiff and defendant subscribed their names at the bottom of the writing, and afterwards sealed and delivered the document as their deed, and it was held that the omission to state the names of the contracting parties in the body of the instrument, was supplied by the signatures at the bottom, and that it sufficiently appeared whose deed it was. (h)

(g) *Unwin v. Wolsley*, 1 T. R. 674. *Macbeath v. Haldimand*, 1 T. R. 180. *Allen v. Waldegrave*, 2 Moore, 628.

(h) *Nurse v. Frampton*, 1 Raym. 2; 1 Salk. 214; s. c. Anon. 4 Ed. 2, cited Cro. Eliz. 57.

A man may bind himself by deed either in his own name, or by some acquired or adopted name, title, or description. "It is a principle of law, that if a man executes a deed by any name, he will be estopped in an action upon the instrument, from disputing that his name is different from that which he has adopted." A bond, entered into and executed by the defendant Davis, who was in partnership with Marsh, purported to be the joint and several bond of "Davis and Marsh;" there was but one seal to the instrument, and against this seal was written the name "Davis and Marsh." The defendant had no authority to bind Marsh, and the deed being void as to the latter, it was contended that it was void as against the defendant also, inasmuch as the designatio personæ did not apply to him; but the court held that as he had described himself in the deed by the name of "Davis and Marsh," he was estopped from showing that his name was Davis only.⁽ⁱ⁾

If a man executes a bond in the name of Thomas, he is estopped by the bond from pleading that his name is Joseph. If he is described as James in the body of the deed, and executes it in the name of John, by writing that name against the seal, and is sued in the name of John, and pleads the misnomer, the plaintiff may rely on the estoppel, and the deed is conclusive evidence of the adoption by the defendant of the names both of James and John.^(k) When a man appears by one name in the body of the deed, and by another at the foot of it, when he executes the instrument, he is liable in either name. "If he pleads in abatement," observes Chambre, J., "it may be replied that he was known as well by the one name as by the other, and the deed will be evidence of it."^(l) If a man, therefore, enters into or executes a deed in an assumed or feigned name, he may be sued, and judgment obtained and execution issued against him in such assumed or feigned name, it being necessary only to establish the fact of his identity.^(m) If having executed a deed in an assumed name, he is sued in his real name, and the difference of names appears upon the face of the record, there must be an averment to explain the discrepancy. "If a declaration against a defendant by one christian name—as, for instance, Joseph,—states that he executed a bond by the name of Thomas, and there be no averment to explain the difference, such as that he was known by the latter name at the time of the execution, such a declaration would be bad on demurrer or in arrest of judgment."⁽ⁿ⁾ In all cases when

(i) *Elliott v. Davis*, 2. B. & P. 339.

(k) *Gould v. Barnes*, 3 Taunt. 505; *Lind v. Hook*, Mod. cas. 225; cited Cro. Eliz. 897, n. (a.)

(l) *Gould v. Barnes*, 3 Taunt. 505; *Cromwell v. Grunsden*, 2 Salk, 462; 1 Ld. Raym. 335.

s. c.; *Williams v. Bryant*, 5 M. & W., 455.

(m) *Reeves v. Slater*, 7 B. & C. 489, 490; 1 M. & B., 265, s. c.

(n) *Parke B. Williams v. Bryant*, 5 M. & W. 454.

there is a *designatio personæ* upon the face of the deed, either in the body, or at the foot of it, parol testimony is of course admissible for the purpose of applying such description, and establishing the identity of the party.

If the defendant has not sealed and delivered the deed with his own hand, it must of course be made out that he is a party to it in point of law, and this can only be done by showing that the person who sealed and delivered the deed in his name, was authorized so to do by a power of attorney or written authority *under SEAL*. (o)

SECTION II.

LIABILITIES UPON SIMPLE CONTRACTS.

Ascertainment of the party to be charged upon SIMPLE CONTRACTS.—In all simple contracts required by the Statute of Frauds, to be expressed in writing, there must, as in the case of deeds, be some *designatio personæ*, or description of the party to be charged. (a) He must be described either by his own name, or by some acquired or adopted name, which must appear either in the body of the writing, or by the signature appended thereto, oral evidence being admissible to apply the description or signature, and establish the identity of the party. But the liability upon simple contracts is not confined, as in deeds, to the person who has signed and executed the contract. A man may contract in the name of an agent by simple contract, and may sign and execute the contract in the name of such agent, and render himself personally responsible thereon. "Parol evidence is always admissible to show that the party sued is the person making the contract, and bound by it, whether he does so in his own name, or in that of another, or in a feigned name . . . If he is sued and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own." (b)

"The doctrine that when a contract is in writing between parties signing

(o) See post. ch. 16, (Principal and Agent,) and ante, 256.

(a) Ante, 80, n. (o) and 117, 160.

(b) Ld. Denman, C. J.; *Trueman v. Loder*, 11 Ad. & E., 594; 3 F. & D., 271, a. c. and see post, ch. 16. (PRINCIPAL AND AGENT.)

their names to it, it cannot be used against other parties than those who signed their names to it—cannot be supported either on principle or authority. There is no question that a (simple) contract, in writing, by an agent, signed by himself, will bind his principal when the other contracting party discovers the principal, although the contract was made without his knowing who the principal is : as for instance, in the case of a bill of lading, signed by the master, where the action is brought against the owners. It is also the case in certain charter-parties, signed by the master, where the owner is rendered liable by the act of the master, because the master is his agent.”(c) “There are innumerable mercantile contracts in writing where the real principal, when disclosed, is made liable, though the contract is entered into by another, and is made in another name than that of the real principal.” (d)

We have already seen (ante 244, 245, 257, 259) that the right of action upon simple contracts is not confined, as in deeds, to the persons with whom the contract is in terms made, or who are named therein as the contracting parties, but that a person by whose authority and instrumentality, and for whose use and benefit, an agreement inter partes has been entered into, may maintain an action thereon, although the contract is not in terms made with him, and although he is not described as a contracting party. This right of action upon a simple contract is naturally followed by a corresponding liability.

If the defendant has not signed or subscribed the writing with his own hand, it must of course be made out that the signature was authorized by him, or that he has since adopted it as his own ; in either of which cases he is liable in point of law as the subscribing party, upon the ancient principle, “*qui per alium facit, per seipsum facere videtur*.” This authority or subsequent ratification may, in the case of simple contracts, be given orally as well as in writing ; it may be created by the conduct and acts of the parties as well as by express words, and it is frequently established by inference and implication of law for the enforcement of contracts and the promotion of honesty and good faith.

Bills of exchange and promissory notes, however, stand upon a somewhat different footing. The general rule with regard to them is, that none but the persons whose names appear upon the face of them can be sued thereon. “Each party who receives the bill is making a contract with the parties on the face of it, and with no one else.”(e) But the parties may

(c) Per Lord Abinger, C. B., *Beckham v. Drake*, 9 M. & W., 91 post.

(d) Parke, B. ib. 96.

(e) Lord Abinger, C. B., and Parke, B., 9 M. & W. 91, 96.

be described and charged in an adopted and acquired name, as well as in their real names. Thus, if a bill of exchange is accepted, or indorsed, in the trading name of a firm in partnership, all the partners are as much liable thereon as if they had attached their individual signatures to the instrument. (f).

LIABILITY of a person who contracts in his own name, and apparently on his own account, but in reality on BEHALF of a THIRD PARTY.

When a person upon the face of a simple contract promises and undertakes in his own name upon sufficient consideration, without reference to any third party, there is of course no question as to the liability of such promisor, although some third party, not named in the face of the contract, may be interested therein, and liable consequently to be sued thereon. (g).

If a servant, or an agent acting on behalf of his master, or principal, enters into a written contract in his own name, without qualification of his liability, or without declaring the agency on the face of such contract, and expressing it to be made by him for and on behalf of his master, or principal, he is liable thereon, although the party with whom he contracted may have known that he was not contracting on his own account. (h).

If a man signs drafts or orders on bankers for the payment of money, or draws, accepts, or indorses bills of exchange, or promissory notes for or on account of third parties, without an express qualification of his liability, he is himself personally responsible upon the bill, note, or draft, although the payee or indorsee knew at the time the signature was attached to the instrument that the subscribing party was not acting on his account, but for and on behalf of another. "It is an universal rule of law, that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, and says plainly, 'I am the mere scribe.'" (i)

Thus when a bill of exchange was drawn and forwarded to D. for acceptance, in payment of a cargo of coals which had been delivered to him, and on the arrival of the bill at his counting-house, it appeared that he had left in pecuniary embarrassment, and that his brother, the defendant, had

(f) *Ball v. Gordon, Tiger v. Gordon*, 9 M. & W. 845, 847; *Furze v. Sharwood*, 2 Ad. & E. n. s. 418; post, ch. 18, s. 2.

(g) "Si j'ai promis en mon nom avec la personne avec qui j'ai contracté, je suis en mon nom obligé envers lui." Pothier, (OBLIGATIONS,)

No. 76. *Harper v. Williams*, 4 Ad. & E., n. s. 231.

(h) *Alford v. Eglishfield*, Dy. 230, b. Post, ch. 16. (Principal and Agent.)

(i) *Ellenborough, C. J.*, 5 M. & S. 349; *Gowpy v. Harden*, 7 Taunt. 159.

come there to investigate his affairs; whereupon the latter was requested to sign the bill, which he did, without declaring on the face of it that he signed it for and on behalf of his brother; and it was objected, that as regarded the defendant, the bill was a mere accommodation bill, without consideration; the court held, that as the defendant had put his name to the bill without qualification, all the legal consequences of the act must follow, and that he was therefore personally liable, as drawer, to pay the bill. "It was in the defendant's discretion," observes Bayley, B., "to sign the bill or not; and if he signed it, he might state on the face of it that he did so as agent for his brother, or have signed 'by procuration.' Had he done so, the latter would have been liable. Here he signed it generally, and thereby incurred personal obligation. It is no answer to say that he had no consideration for binding himself personally if he has professed to do so; for the plaintiffs were entitled to insist on having some bill to be binding on some one. The debt of a third person is a good consideration, for which a man may bind himself by giving a bill of exchange." (k)

SIMPLE CONTRACTS *appearing on the face of them to be made by the PROMISOR, "for and on behalf" of a THIRD PARTY.*

AGREEMENTS by one person "on behalf" of another.—When a person who is made a party to an agreement, *inter partes*, declares upon the face of the contract that he promises, or agrees, for and on behalf of a third person, who is named therein, the party so promising, or agreeing, will not be personally liable upon the contract, if he had authority from the person on whose behalf he professes to act, to enter into that contract for him. Having bound the latter by the contract, he is not himself regarded as one of the contracting parties, but merely as a medium of communication between them. But if he has contracted without authority from the party on whose behalf he professes to act, or has exceeded the authority given him, and has consequently failed to bind such third party by the contract, he is himself personally liable as a principal in the transaction, and the really contracting party. And the same result follows in general, if there is no responsible principal to resort to. Thus where the plaintiff agreed with two persons "to pave their streets in Putney," and they "on behalf of the parish agreed to pay him" therefor; it was held, that as the parish could not be sued upon such an undertaking, the work must be taken to have been done upon the personal credit and security of the promisors,

(k) *Sowerby v. Butcher*, 4 Tyr. 324; 2 Cr. & M. 368, s. c.

and that they were therefore personally liable upon their agreement. (*l*) So where the respective attorneys for the prosecutor and defendants on an indictment against the same parish for not repaving a road, entered into an agreement, by which the attorney for the prosecutor agreed that the recognizances should be respited, and the attorney for the defendants agreed "on the part of the parish" to pay the costs, it was held that the agreement was personally binding upon the attorney for the defendants. (*m*).

GUARANTEES *expressed to be made by one person on behalf of another.*

—An undertaking in writing by one man to pay money on behalf of another who is named therein, may either be the undertaking of an agent acting on behalf of a named principal, binding the latter, and not himself, by the contract, or it may be the undertaking of a principal and sole contracting party, who comes forward to secure, on his own credit and responsibility, some benefit and advantage for a friend; or it may be the undertaking and guarantee of a surety, who binds himself for the performance of some act, or duty, by a third party, who is to be primarily liable upon the contract. "It is impossible to ascertain with certainty, merely from the language of the promise, whether it creates a personal liability on the promisor or not." (*n*)

The words, "I undertake on behalf of A. to pay," observes Tindal, C. J., "would seem in their natural meaning to point rather to a promise made by one person as agent of another, than as intending to bind the party using them in the character of principal;" (*o*) and therefore if the party so promising appears to have been fully authorized to make the promise, he will be deemed to be merely an agent, and not the principal contracting party. But if he has no authority from the person on whose behalf he promises, and the latter is not bound by the undertaking, then the promisor himself is the principal, and really contracting party, pledging his own credit, and responsibility, for the benefit and advantage of the person named in the contract. (*p*). One person may, as we have already seen, have the benefit of the performance of the consideration for a simple contract or promise, and another may be liable upon it as the really contracting party; (ante 100, 103). "If A. contracts with B. to make a coat for C., A. must pay for it, though C. wears it." (*q*).

An action was brought upon a guarantee signed by the defendant in

(*l*) *Meriel v. Wymondesol*, Hardr. 205.

(*m*) *Watson v. Murrel*, 1 C. & P. 807.

(*n*) *Denman, C. J.*, 4 Ad. & E.; n. s. 237.

(*o*) *Dovaman v. Jones*, 14 Law, J., n. s. (Q. B.) 228.

(*p*) *Harper v. Williams*, 4 Ad. & E., n. s. 231.

(*q*) *Maule, J.*, 15 Law, J., n. s. (C. P.) 129. *Hargreaves v. Parsons*, 13 M. & W. 561. 570.

the following words:—"Gentlemen,—On behalf of Nissen and Co., of Riga, I hereby guarantee that the shipment of hemp in the Carolina will be found to be in conformity with the revenue laws of Great Britain, so that no impediment shall arise on the importation thereof, or that in default thereof the consequences shall rest with Nissen and Co.;" and it was held, that as it did not appear that Nissen and Co. had authorized the defendant to give this guarantee on their behalf, and there was nothing to show that they could be sued upon it, the guarantee must be taken to be the personal guarantee of the defendant, and not the guarantee of Nissen and Co. (*r*). The party on whose behalf the guarantee was made in this case resided, it will be seen, abroad; and the fair inference from the evidence was, that the personal security of the promisor was relied upon and intended to be given, and not that of the person on whose behalf the undertaking was stated to be made.

The solicitor of the London creditors of a bankrupt wrote to the solicitor of the country creditors of the same bankrupt in the following terms:—"I am willing on behalf of the London creditors to bear two-thirds of the expense of resisting Mr. K——'s proof under the commission, and of investigating the accounts of the assignees . . . and I hereby undertake to bear and pay on behalf of these creditors, two-thirds of the expenses incident thereto accordingly;" and in another letter he added, "I have no objection to bear, as before, the proportion of expense, &c.;" and it was held, that as there was nothing upon the face of the correspondence leading to the conclusion that the London creditors had authorized the undertaking, and nothing to show that they were individually known to the plaintiff, or had in any way interfered in the transaction, and rendered themselves personally liable, it must be taken that the solicitor was intended to be the paymaster, and that his personal liability was relied upon, and intended to be given, and not that of the London creditors at large. (*s*)

The attorneys in a cause signed an agreement purporting to be made by them as the "attorneys of the plaintiff and defendant," whereby they "did personally undertake and agree" that the record should be withdrawn, and that certain things should be done by the plaintiff and defendant respectively, and it was held that the attorneys were responsible for the performance of the things stipulated to be done. "There is nothing," observes the Court, "in this agreement which can in anyway bind the client; he does not undertake to pay. What is the use of the word personally unless

(*r*) *Redhead v. Casor*, 1 Stark. 14.

(*s*) *Hall v. Ashurst*, 1 Cr. & M. 714.

it binds the individual signing the paper? If the defendant only meant to bind the client, it can hardly be supposed that he would not have so expressed himself. Here the principal is out of the question; and it is highly probable that the parties would not have trusted the client, and, therefore, stipulated for the personal undertaking of the attorney. Suppose the client were sued upon this undertaking, he would have a right to say, 'I never authorized my attorney to do this; it is true I have given him a general authority to do the best for me; but I do not think this is the best thing he could have done.' We think that when an attorney says, 'I personally undertake to do so and so, he is pledging his personal responsibility.' (t) It is out of the scope of his authority as attorney, and the undertaking, therefore, cannot bind the client.

The solicitors under a commission of bankruptcy, wishing to get rid of a distress, undertook, "as solicitors to the assignees," to pay the landlord his rent, and it was held that they were personally liable on their undertaking. "Many persons," observe the Chief Justice and Judges of the Court of King's Bench, "will deal with solicitors and professional men, (from the confidence they have in their known character and situation in life,) who will not deal with an unknown client." "If the defendants are not personally liable, nobody is bound by this undertaking, for it is perfectly clear that the assignees are not bound. The import of the instrument is, not that the assignees undertake through the medium of the defendants, as their solicitors, but that they the defendants themselves as solicitors undertake. . . . The term as solicitors is merely descriptive of the character they fill." (u)

A landlord having distrained upon the goods and chattels of his tenant, a bankrupt, the assignee of the estate gave to the plaintiff the following undertaking. "As assignee of the estate and effects of Richard Lord, a bankrupt, I hereby undertake, in consideration of Mrs. Stephens (the plaintiff) withdrawing the person put into possession of Mr. Lord's effects, under a distress for the sum of £350. . . . that the said sum of £350 shall be paid to Mr. Stephen out of the proceeds of the sale of the same effects." The plaintiff then withdrew the distress, but before the defendant could obtain any part of the bankrupt's effects, the fiat was annulled, and it was held, in an action brought by the plaintiff on the undertaking, that the defendant had made himself personally liable thereon. (v)

A person, also, who professes upon the face of an agreement in writing

(t) *Per Curiam Iveson v. Connington*, 2 D. & E. 309, *In re Gee*, 10 Jur. 694.

(u) *Per Abbott, C. J. Holroyd, J., & Best, J. Burrell v. Jones*, 3 B. & Ald. 47—51.

(v) *Stephens v. Pell*, 4 Tyr. 6. 2 Myl. & K. 336, *nom. Pell v. Stephens*, 2 Cr. & Mees. 710, s. c.

to be acting for and on behalf of another, may, by express words, render himself personally liable as a surety for the performance of some act by the party on whose account he professes to act. (w)

An attorney, acting on behalf of his client in order to stave off legal proceedings which were threatened to be taken against the client for the recovery of a debt due from the latter to the plaintiff, wrote a letter to the plaintiff, inclosing his client's acceptance for the amount of the debt, and, in order to induce the plaintiff to take this acceptance and suspend the right of action during the time the bill had to run, added, "I will see it paid," and it was held that the attorney was personally liable upon his undertaking as a surety after the default of his client, the principal debtor, to take up and pay the bill when it came to maturity. (x)

By a written agreement expressed to be made by the defendant on behalf of E. B. of the one part, and the plaintiff of the other part, the defendant agreed to execute unto the plaintiff a lease of certain messuages and premises, and it was held that the defendant was personally responsible upon his undertaking for the execution of the lease so agreed to be granted. (y)

Bills of exchange and promissory notes expressed to be accepted, made, or indorsed, on behalf of a THIRD PERSON who is named on the face of the instrument, will not render the acceptor, maker, or indorser, personally liable, provided he has authority from such person to sign the instrument in his behalf. (z) But if no such authority has been expressly, or impliedly given, the party so signing the instrument is responsible as the really contracting party, and the same result naturally follows if there be no principal to resort to. A person cannot, merely by assigning to himself a representative character, escape from personal liability in respect of his contracts. He may undertake or promise as "solicitor," "attorney," "assignee," "director," "overseer," "guardian," "churchwarden," "trustee," or "commissioner," but unless his contracts in those capacities bind some known third party, such words are mere matter of description, and the irresistible conclusion is, that the party with whom he has contracted must have looked to the personal security of the promisor for the due performance of the contract. Somebody must have been intended to be bound by the contract, and if there is no third party to resort to, the person so contracting or promising as "trustee," "commissioner," &c., is the party to be charged.

(w) *Nostris, et aliorum moribus, quæ factum alienum promittit, tacite intelligitur promittere se curaturum aut effecturum, ut alius det, aut faciat.* Vin. Com. 706.

(x) *Emmett v. Kearns*, 7 Sc. 687, ante p. 109, 110.

(y) *Talbot v. Godbolt*, Yelv. 137.

(z) *Ex parte Buckley*, 14 M. & W. 469.

A bill of exchange was drawn upon the defendant by the description of "Mr. H. Bishop, *cashier* of the York Buildings Company," directing him "to place the same to the account of the York Buildings Company," and the bill was accepted by the defendant as "cashier" of the company, and it was held that he was, nevertheless, personally liable upon it. (*a*)

An inclosure act empowered certain commissioners, appointed under the act to make a rate to defray the expenses of passing and executing the act, and enacted that persons advancing money for the purposes of the act should be repaid out of the first money raised by the commissioners. The commissioners drew drafts upon their bankers in the following form:—
". . . . pay J. M., or bearer, £— on account of the public drainage, and place the same to our account as commissioners, &c." And it was held that the commissioners themselves were personally responsible for the money advanced upon such drafts. (*b*)

If a bill of exchange be endorsed to certain persons "as executors," and they again indorse the bill without qualification of their liability, they will be individually responsible upon their indorsement. (*c*) So if they make promissory notes "as executors," "churchwardens," "overseers," &c., they will be responsible upon such notes. Two executors gave a promissory note on account of a debt due from their testator in the following form:—
"As executors to the late T. T. we severally and jointly promise to pay to Mr. N. C. the sum of £200 on demand, with lawful interest thereon." And it was held that by the giving of such a note the executors had made the debt their own, and that as they had not limited their liability by any express declaration that the money was to be paid out of the estate of their testator, when they should have assets in their hands for that purpose, they were themselves personally responsible for the amount of the note. (*d*)

N. lent the parish of C. the sum of £200, to secure the repayment of which the churchwardens and overseer gave promissory notes to C., whereby "as churchwardens and overseers" they promised to pay to C., or order, the sum of £200 with interest, and it was held that they were personally liable upon the notes. (*e*)

(*a*) *Thomas v. Bishop*, 2 Str. 955. Cas. temp. Hardwick, 1, s. c.

(*b*) *Eaton v. Bell*, 5 B & Ald. 34.

(*c*) *Buller, J. King v. Thom*, 1 T. R. 489.

(*d*) *Childs v. Monins*, 2 B. & B. 460, 5 Moo. 282, s. c.

(*e*) *Crew v. Pattit*, 3 N. & M. 456, 1 Ad. & E. 196, s. c.

SECTION III.

ORAL CONTRACTS AND IMPLIED CONTRACTS.

Liabilities ex Contractu of TRUSTEES and COMMISSIONERS of PUBLIC WORKS, and MANAGING COMMITTEES of clubs and eleemosynary institutions.—When a man orders goods from tradesmen, or directs things to be done by workmen and servants for himself and for his own use and benefit, there is of course no doubt or question as to his liability upon the ordinary implied promise of payment and remuneration, whether the orders and directions were given by himself personally, or through the medium of a third party, whom he employed for the purpose. When the orders are for goods to be furnished, or things to be done for some third party whose name is given, the question to be asked and answered in order to determine the liability is, “to whom was the credit given—to the party giving the orders, or to the person to whom the goods were to be delivered, or for whom the things were to be done.” If the orders were executed on the credit of the former, and on the belief that he would be the paymaster, then he is of course the party to be charged; if on the credit of the latter, then the latter is the person to be sued as the real debtor and the principal in the transaction. When there is no third party to resort to for payment, the irresistible conclusion is, that the credit was given to the person by whose directions the goods were furnished and the things done, and he is, therefore, responsible for the payment of the price of them.

TRUSTEES and COMMISSIONERS of PUBLIC WORKS for example are personally responsible upon contracts for work and labour, and the supply of materials entered into by them in their official capacity, in the promotion of the undertaking intrusted to their management. They have generally power to raise tolls or to impose assessments and create a fund to defray the expenses they are authorized to incur, and they ought, therefore, to avoid entering into contracts until they have money in hand, or have ascertained that they have resources at their command sufficient to cover their expenditure. The parties whom they employ cannot know the state of the funds at their disposal, nor is it their business to inquire; the credit is always presumed to be given to the commissioners or trustees, by whose orders the party seeking for remuneration has been employed, unless

it can be shown that the latter has expressly agreed to look to some other source for payment, or not to hold them personally responsible. (a)

An Act of Parliament was passed for making a river navigable, and certain commissioners were empowered to raise and borrow money upon the tolls of the navigation. Subscriptions were made and the work was begun, and the plaintiff was employed by the commissioners to make cuts in different parts of the river. The plaintiff at different times received money on account, but the commissioners having at length exhausted their funds, and being unable to raise any more money upon the credit of the expected tolls, neglected to pay the plaintiff the residue of his bill, whereupon the latter brought an action against them to recover the amount remaining due to him. For the commissioners it was contended that the work was a publick work, not carried on for their own benefit and advantage, and that it was not intended by the Act of Parliament that they should be personally responsible in respect of things done and orders given by them in carrying the act into effect, but the court held that as there was no fund to which the plaintiff could resort for payment, the work must be taken to have been done upon the personal credit and security of the commissioners; that the plaintiff could not be considered to have given credit to the success of the undertaking, and have rested his expectation of payment upon the contingency of the realisation by the commissioners of subscriptions and tolls, that he must naturally have looked to some one for payment, and, as the commissioners had given the orders, and no one else was responsible, they were themselves personally liable. (b) As trustees and commissioners in these cases "must know whether there are funds to answer the purpose, they, when they contract with others who do not know, act as if representing that they have a fund applicable to the object, and are then personally bound to provide funds to pay the contractors." (c)

If an act of Parliament empowers trustees or commissioners to impose tolls or make rates and assessments to create a trust fund for the payment of expenses, and authorises money to be borrowed on the security of the tolls and rates, and provides the mode of doing it, and enacts that the trustees or commissioners shall not be personally responsible in respect of money borrowed by them pursuant to the act, and the trustees or commissioners neglect to follow the prescribed mode, and fail consequently to charge the fund with the repayment of the money borrowed, they are themselves personally responsible and cannot protect themselves by the clause of in-

(a) *Hoskins v. Slayton*, Cas. temp. Hardwicke 376. *Cole v. Green*, 7 Sc. N. R. 682. 6 M. & Gr. 872 s. c.

(b) *Horsley v. Bell*, Amb. 770. 1 Br. C. C. 101 n.

(c) *Higgins v. Livingston*, 4 Dow. 342, per Id. Eldon.

demnity, which applies only to money raised in the authorized mode and charged upon the fund.

The trustees or commissioners of a turnpike road were empowered by act of parliament, to borrow money, at interest, on the credit of the tolls arising on such road, and to mortgage the tolls and toll houses as a security for such advances. After a large sum of money had been borrowed on mortgage, the trustees became desirous of obtaining a temporary loan from their banker and treasurer, and their chairman signed a minute of a resolution requesting him to make a temporary advance of £1,000 at £5 per cent. The banker thereupon permitted the trustees to draw upon him to the required amount, and the money not being repaid, he brought an action against the chairman for its recovery, and it was held that as the money had not been secured by a mortgage of the tolls and toll houses, and the funds of the trustees were not in any way charged with its repayment, it must be taken to have been advanced upon the personal security of the defendant, and that he was therefore personally responsible for its repayment.(d)

MANAGING COMMITTEES *of* CLUBS *and* ELEEMOSYNARY INSTITUTIONS are likewise personally responsible for the payment of tradesmen who have supplied goods, and to servants who have performed work and rendered services for the benefit of the club, or for the advancement of the common objects of the institution, by the order of the committee, as the credit is deemed to have been given to the committee, and not to the subscribers at large, who are a constantly fluctuating body, unknown individually to the persons executing such orders.(e)

Subscribers who pay an entrance fee on admission to a club, and an annual subscription afterwards, for the purpose of forming a fund for defraying the expenses of the establishment, and who appoint a committee to administer such fund, are not themselves responsible upon the contracts and engagements, or for the debts and liabilities of such committee,(f) unless it can be shown that they individually concurred in, or assented to the orders given, knowing at the time that the funds in hand were insufficient to satisfy the expenses. As the members of the committee, therefore, in these cases, do not bind the subscribers at large, by their contracts, and give to the persons whom they have employed, a tangible third party to proceed against, they are themselves the only persons who can be sued, and are in fact principals in the transaction.

In an action brought by a baker to recover payment for a quantity of

(d) *Parrott v. Eyre*, 3 M. & Sc., 857. 10 404; 1 Br. C. C. 101.
Bing, 283, s. c.

(e) *Cullen v. Duke of Queensbury*, 1 Br. P. C.

(f) *Fleming v. Hector*, 2 M. & W. 172.

bread furnished, from time to time, to a hospital, it appeared that the hospital was an eleemosynary institution, which had been set on foot and was supported by charitable contributions; that the management of it was vested in a committee appointed by the subscribers at large, which committee met once a month to regulate their expenditure, audit the accounts, and give directions for the future supplies: that the defendant was a member of the committee, attended the meetings, and sometimes presided at them, and it was held that he was responsible, together with the other members of the committee, for the payment of the bread furnished to the institution by the plaintiff. (g)

If the managing committee of a club, or eleemosynary, or literary institution, or any other association of persons allow the steward or secretary or any one of the members of the committee to discharge the functions of the whole of the body—to order supplies of goods, or hire workmen and servants for the use of the institution, they make him their general agent, and clothe him with an implied authority to pledge their credit for the payment of the things ordered, and of the people employed by him within the limits of the ordinary course of dealing, unless they have beforehand furnished him with sufficient funds for the purpose, and never permitted him to deal on credit. “They would not be held liable if he were to purchase a horse or a carriage, or such like;” but they would be considered to have given him an implied authority to order all such things as were customary and usual for the purposes of the association. (h)

All committee-men have the means of being acquainted with the resources of the institution they are appointed to manage, and have the power of limiting its engagements, and of checking the expenditure or withdrawing themselves from the management, and giving notice thereof to the persons who have been in the habit of executing the orders of the steward or secretary, or other agent of the committee; and if they do neither the one nor the other they are responsible for the debts and engagements that may be incurred, although they are themselves mere subscribers to a public charity, rendering gratuitous services, and have no personal interest in the subject matter of the contract.

Thus where a hospital had originally been under the management of the founder, who had regularly paid for the meat, bread, and provisions ordered for the use of the sick patients, by the servants of the hospital, and afterwards a committee of management was formed, and the servants continued to order supplies of goods from tradesmen as before, it was held that

(g) *Burl v. Smith*, 7 Bing. 705; 5 M. & P. 785.

(h) *Bartlett v. Lambert*, 10 Jar. 416.

all the members of the committee who had entered upon their duties, and undertaken the management of the affairs of the institution, were responsible for the payment of the goods furnished by tradesmen subsequent to their acceptance of office. "You are to look," observed Tindal, C. J., in his charge to the jury, "and see who were the masters of these persons, (the servants giving the orders,) for if there are persons who manage institutions of this description, they make themselves liable for the orders given by their servants. The question, therefore, is, whether the committee did so conduct and hold themselves out as the managers and employers of the persons who gave the orders, as that any tradesman at the time, knowing this, might reasonably conclude that he was supplying his goods on their credit." (i)

So if goods have been furnished by the orders of one only of the members of the committee of management, it is a question for the jury to determine whether the goods were furnished upon the personal and individual credit of the party actually ordering them, or on the credit of the persons managing the institution. (k) The general rule is, that every member of the committee who is cognizant of orders given by any one of his colleagues individually, or by a steward, secretary, or servant of the institution, and does not interfere or prohibit the execution of such order, or withdraw from the management, is deemed to have assented to what has been done, and will be responsible accordingly. (l) If orders have been given at a meeting of the committee by a majority against the wishes of the minority, the parties in the minority will not be responsible if they proclaim their dissent and retire from the direction of affairs; but if they continue to belong to the committee of management, and continue to act as directors, they will be deemed to have assented to the proceedings of the majority, or to have consented to be bound thereby.

Parishes, Parish Officers, and Vestrymen.—Agreements entered into by the churchwardens and parishioners, will, under certain circumstances, be binding upon the parish in equity. Thus where the plaintiff's house being so near the church that the five o'clock bell rung in the morning disturbed her, and it was agreed between her and the churchwardens and parishioners in vestry assembled, that a cupola and clock should be erected by her on the church, and that, in consideration of this being done, the five o'clock bell should not be again rung during her life, and the cupola and clock were accordingly erected, and the bell was silenced for two years, after

(i) Tindal, C. J. *Glenester v. Hunter*, 5 C. & P. 65. W. 505; Post ch. 30. (Joint and several liabilities.)

(k) *Todd v. Emly*, 7 M. & W. 427; 8 M. &

(l) *Delauney v. Strickland*, 2 Stark. 416.

which time it was rung again, the Court of Chancery held that the agreement was binding upon the parish, and decreed an injunction against the ringing of the bell. (*m*) But as churchwardens, overseers of the poor, and parish officers have no power of contracting so as to give any right of action against the parish, they are themselves personally responsible upon all contracts entered into by them in the exercise of the duties of their office. They have the means, if they choose to employ them, of obtaining funds from the parishioners to defray all necessary expenses, and it is their own fault if they incur liability without having the means at hand of indemnifying themselves. (*n*)

Thus, where five parish officers were appointed for the management of the affairs of a parish for the current year—viz., two churchwardens, two overseers, and one vestry clerk and assistant overseer, the terms of whose appointment did not appear, and at their meetings for the relief of the poor orders were given upon a shopkeeper for goods, and sometimes for money to pay their monthly allowances, which orders the shopkeeper complied with. Three only of the officers ever signed such orders; the assistant overseer being one, and signing sometimes by his own name only, and sometimes as clerk or overseer. All of them used to attend the board, but not at the same time, and when called upon there to pay the shopkeeper for his goods and advances, had promised to do so; and it was held that they were all responsible for the payment of the price of the goods, and the repayment of the advances ordered at such meetings, and might be sued for the amount after the expiration of their current year of office, as well as before it had elapsed. (*o*)

By a local act for the government of the poor of the parish of N., power was given to the churchwardens, and overseers, and guardians, and directors, or any five or more of them, to contract for the supply of the poor of the parish with provisions, and the money collected by poor rates, was directed to be paid into the hands of a treasurer, appointed under the provisions of the act, who was to apply the money under the orders of the governors and directors, or any five or more of them. The plaintiff, a baker, received orders from time to time, from the "governors and directors," to send in supplies of bread to the workhouse for the use of the poor. All the governors and directors, churchwardens and overseers had, at one time or another, concurred in and assented to the orders so given, and it was held

(*m*) *Martin v. Nutkin*, 2 P.Wms. 266.

(*n*) *Kirby v. Banister*, 5 B. & Ad. 1069. 3 N. & M. 119, s. c.

(*o*) *Kirby v. Banister*, 5 B. & Ad. 1069. 3 N.

& M. 119, s. c. *Holt, C. J. Anon.* 12 Mod. 559. *Brook v. Guest*, cited 8 Bing. 481. *Barton v. Griffiths*, 11 M. & W. 817. *Uthwatt v. Elkins*, 13 M. & W. 772.

that they were all equally responsible to the plaintiff for the payment of the price of the things furnished by him in obedience to such orders.(p)

Several parishioners attended at a vestry, and signed resolutions authorising the churchwardens to cause the tower of the parish church to be repaired ; the repairs were done, and a rate was made by the churchwardens on the parishioners for the purpose of defraying the expenses, but this rate, on appeal, was quashed. Pending the appeal, the plaintiff, one of the churchwardens, was sued by the tradesmen who had done the work, and was eventually obliged to pay the whole cost of the repairs ; he then brought his action against the defendant, the other churchwarden, for contribution, and it was held that he was entitled to recover from him a moiety of the amount he had been compelled to pay ; the other churchwarden having concurred in the orders given for the repairs.(q)

But there is no authority from one parish officer to bind another, resulting from the mere tenure of office. One churchwarden, for example, has no authority as such to pledge the credit of his co-churchwardens for repairs to the parish church, and if he gives orders without their knowledge and concurrence he cannot involve them in the liability incurred in respect of the execution of such orders.(r) A mere honorary churchwarden, who takes no active part in the management of the parish affairs, but devolves all the duties of the office upon a paid colleague cannot be made responsible for the acts and orders of the latter. And an overseer who directs money or goods to be supplied by a third party to certain poor people cannot make his co-overseers responsible for the payment of the goods unless they have expressly or impliedly concurred in such orders or directions either by being present when they were given, or by being in the habit of attending meetings of the overseers and relieving officers, at which orders and directions of that description were in the habit of being given, as previously mentioned.

Whether the ordering of goods by one parish officer for the use of the parish creates a contract binding upon his colleagues, is a question of fact depending upon the particular circumstances of each case.(s)

Overseers of the Poor are bound to take care of casual poor within their parishes, and the law obliges them to reimburse a private individual expenses necessarily incurred by him in procuring relief and medical attendance for a casual pauper on any sudden emergency.(t) If an accident

(p) *Lambert v. Knott*, 6 D. & R. 122.

(q) *Lanchester v. Tricker*, 8 Moore, 20.

(r) *Northwaite v. Bennett*, 2 Cr. & M. 316, 4 Tyr. 236, s. c.

(s) *Eaden v. Titchmarsh*, 1 Ad. & E. 691, 3 N. & M. 712, s. c. *Massey v. Knowles*, 3 Stark. 65. *Malkin v. Vickerstaff*, 3 B. & Ald. 89.

(t) *Simmons v. Wi/mot*, 3 Esp. 91.

happens in the parish of A. to a pauper belonging to the parish of B., which disables the pauper, and he is then removed to his own place of abode in his own parish of B. and attended by the surgeon of that parish, the surgeon may maintain an action against the officers of the parish of A. where the accident happened, to recover a reasonable compensation for his medicines and attendance.^(u)

"The stat. 59 Geo. 3, c. 12, which gives the churchwardens and overseers power to hold land in the nature of a corporation, (not as a general but as a special corporation,) applies to those cases only where the rents are applicable solely to parochial purposes which are under the control of the parish officers. If the churchwardens and overseers take land jointly with other persons, the terms of the statute are not complied with, as the land cannot be managed by them exclusively for the use of the poor when other persons have the legal estate jointly with them, and might apply part of the land to other purposes." An agreement, therefore, by the churchwardens, overseers, and *surveyors*, for the lease of land to be converted into gardens for the occupation of the poor, is a personal contract of their own upon which they are individually liable; and they may, consequently, be sued for the rent agreed to be paid to the owner, or for use and occupation, although they have ceased to be parish officers.^(v)

Vestrymen who attend the parish meetings, and concur in and sign resolutions for the repairs of the church or the parish roads, for the purpose of setting the churchwardens and surveyors in motion, and authorizing them to act on behalf of the parish, do not incur any individual liability in respect of the carrying out of such resolutions, and of the orders given by the parish officers founded thereon. They have not, like churchwardens, the power of making a rate to provide a fund for defraying expenses, and it is notorious that they attend merely for the purpose of authorising certain things to be done which are to be paid for by a rate upon the parish, and their own individual credit and responsibility are not considered to be in anywise pledged for the payment of the expenses incurred in carrying the vestry resolutions into effect. If the vestrymen were to be considered personally liable, "every inhabitant of a parish would be placed in this situation—if he attended a vestry and signed resolutions at such vestry directing such acts to be done, and soon after ceased to be an inhabitant of the parish and retired to a distant part, he might be called upon, years

^(u) *Tomlinson v. Bental*, 5 B. & C. 745, 8 D. & B. 493; *Lamb v. Bunce*, 4 M. & S. 275; *Atkins v. Barwell*, 2 East, 505; *Watling v. Wal-*

ters, 1 C. & P. 182; *Paynter v. Williams*, 1 Cr. & M. 815.

^(v) *Uthwatt v. Elkins*, 13 M. & W. 772, 777, 5 & 6 Vict. c. 57, ante 293.

afterwards, to contribute towards expenses incurred in the prosecution of that, over which he had no control, from which he derived no benefit, and for which he had no power to reimburse himself out of any parochial fund or rate."(*w*) Therefore, where several parishioners attended a vestry meeting and signed resolutions authorising the churchwardens to repair the church tower, and the churchwardens neglected to make a prospective rate for the purpose of raising the necessary money before they went out of office, it was held that the parishioners who had signed such resolutions could not be made responsible for the payment of the repairs.(*x*) So where the parishioners at a special vestry "resolved" that an indictment preferred against the parish for the non-repair of a highway "should be opposed, and that the surveyors be desired to take the necessary steps for carrying this resolution into effect," it was held that the parties attending and concurring in the resolution did not render themselves individually or collectively responsible for the payment of the costs of an attorney employed by the surveyors for the purpose.(*y*)

But vestrymen, in vestry assembled, may, like any other persons, exceed their duties as vestrymen, and give their own personal undertaking in respect of the affairs of the parish. Thus, where twenty-four persons in vestry assembled signed a guarantee which was entered in the vestry minute book to the following effect:—"At a vestry meeting, held, &c., it was moved and seconded by, &c., that this meeting do highly approve of the proceedings taken by the present surveyor for the recovery of the money due to the hamlet from, &c., and *do hereby* GUARANTEE to him all legal expenses that are or may be hereafter incurred by him in prosecuting the said suit;" and it was held by Lord Tenterden that all the vestrymen who had signed the guarantee so entered in the vestry minute-book had rendered themselves personally responsible for the fulfilment of their engagement.(*z*)

A *surveyor* of turnpike roads being the mere servant or agent of the commissioners, is not himself in general responsible for the payment of the contractors and labourers employed upon the road.(*a*)

(*w*) *Best*, C. J. 11 *Moore*, 409.

(*x*) *Lanchester v. Tricker*, 8 *Moore*, 20, 1 *Bing.* 201, s. c. *Lanchester v. Frewer*, 9 *Moore*, 688, 2 *Bing.* 361, s. c.

(*y*) *Sprott v. Powell*, 11 *Moore*, 398, 3 *Bing.* 478, s. c.

(*z*) *Heudebwick v. Langton*, 3 C. & P. 571. *Uthwatt v. Elkins*, 13 M. & W. 772.

(*a*) *Pochin v. Pawley*, 1 W. Bl. 670. As to actions against surveyors for double the amount of money not paid over by them to their successors in office and the notice of action in such cases, *Heudebwick v. Langton*, 3 C. & P. 566 10 B. & C. 546, s. c.

CHAPTER XVI.

LIABILITIES EX CONTRACTU IN THE CASE OF PRINCIPAL AND AGENT.

SECTION I.—*Deeds*.—Of the respective liabilities of the principal and agent upon contracts under seal
—Of the authority of the agent to bind the principal by deed—Of the execution of such authority
—Of the requisite form of covenant to bind the principal and not the agent.

SECTION II.—*Liability of the Principal upon Simple Contracts*.—Of the agent's authority to sign simple contracts for the principal—Inferences resulting from repeated employment—Subsequent ratification—Of the liability of an undisclosed principal—Of the extent and duration of the liability of the principal—Principal how discharged—Satisfaction of the debt by the agent—Acceptance of bills and notes by the creditor from the agent by way of payment—Liability of the principal in respect of deception and fraud on the part of his agent—Misstatements and misrepresentations by the agent binding on the principal—Fraudulent concealment and deceit on the part of the principal and not of the agent.

SECTION III.—*Liability of the Agent upon Simple Contracts*.—Agreements and undertakings in writing by an agent whose representative character is not disclosed on the face thereof—Bills of exchange and promissory notes signed by an agent without qualification of his liability—Effect of a declaration of the agency upon the face of the contract—Liability of an agent who contracts without due authority from his principal—Or who exceeds his authority—Liability of the agent upon implied contracts—Government officers and agents—Money received by the agent for the use of the principal.

SECTION I.

LIABILITY OF THE PRINCIPAL AND AGENT UPON DEEDS. (a)

Liability of the Principal.—The authority of an agent to bind his principal by deed, must itself be *under SEAL*, (b) and the deed, when executed by the agent, must be sealed and delivered by him in the name of his

(a) As to the right of action of the principal and agent upon deeds, see ante 255 to 257.

(b) *Horsley v. Rush*, cited 7 T. R. 209. *Harrison v. Jackson*, ib. 210. *Williams v. Walsh*, 4 Esp. 220. *Steiglitz v. Egginton*, 1 Holt, 141.

principal, and not in his own name.(c) The covenants, moreover, contained in the deed must be expressed to be made by the principal himself, and not by the agent on his behalf. If the agent contracts in his own name, the principal cannot be sued, because the contract is upon the face of it; the contract of the agent (who makes himself a trustee for the principal,) and not the contract of the principal himself.

We have already seen, that if a covenant be made with A. for and on behalf of B., or for the use and benefit of B., B. cannot sue thereon; but that the right of action is vested in A., with whom the contract is in terms made, and who stands in the position of a trustee for B. (ante 242, 256.(d) The same rule naturally prevails respecting the liability upon such a covenant, and B. cannot be sued thereon, as he has not covenanted in his own name.

Liability of the Agent.—We have already seen that if a man covenants in his own name, for and on behalf of another, and seals the deed, he is personally liable upon his covenant; it follows, therefore, that if an agent contracts under seal in his own name, on behalf of his principal, he is himself personally responsible for the fulfilment of the contract. He gives his own personal undertaking for the performance of the act covenanted to be done.

There is a wide distinction between entering into a deed, for and on behalf of another, and merely executing it in his behalf. If an agent is duly authorized by power of attorney under seal to enter into and execute a deed for his principal, and the principal is made to contract in his own name, and the agent merely executes the deed for him, then the principal, and not the agent, is bound by the execution of the deed. In such a case it is usual to denote by some form of words that the deed is executed by an agent on behalf of the principal; the agent either signs his own name, adding "for B.," (the principal,) or he signs the name of B., adding, "by A. his attorney;" and as the sealing and delivery of a deed only are at common law sufficient for its due execution, (e) it is apprehended that if that be done by the agent on behalf of the principal, the contract would be binding on the latter whatever signature or form of words might be attached to the seal.

To the general rule, that the authority of the agent to bind the princi-

(c) Co. Litt. 258, a. Anon. Moore, 70, pl. 19. *Coombe's case* 9 Co. 77 a. *Frontin v. Small*, 2 Str. 705. *White v. Cuyler*, 6 T. R. 176.

(d) By 8 & 9 Vict. c. 106, it is enacted, that after the 1st of Oct., 1845, an immediate estate or interest, and the benefit of a condition or co-

venant respecting any tenements or hereditaments may be taken, although the taker thereof be not named a party to the deed.

(e) Bacon's Abr. (Obligation) c. *Cronwell v. Greensden*, 2 Salk. 462. Com. Dig. Fait, B. 1.

pal by deed must be under seal; there is, however, an exception in the case of two joint contractors, one of whom it has been held may execute a deed for himself and the other without an authority under seal, provided the execution be made "for himself and the other *in the presence* of that other."^(f)

When the principal himself is made to covenant, and the agent appears merely as the executing party, if the agent has not an authority, under seal, to warrant his acts, there is no binding contract at all, the principal cannot be bound as he has not legally sanctioned the contract, and the agent cannot be made liable upon it as he has not contracted in his own name.

SECTION II.

OF THE LIABILITY OF THE PRINCIPAL UPON SIMPLE CONTRACTS.^(a)

Of the agent's authority to sign writings for the principal—Except for the purposes described in the first, second, and third sections of the statute of frauds; viz., for the purpose of creating leases, estates of freehold, or any uncertain interest in lands, tenements, or hereditaments, other than leases under three years, and except in the case of agents appointed by a corporation to bind the corporate body to certain contracts, a mere verbal authority to the agent will suffice to bind the principal, and in the great majority of instances, an authority binding one man to the acts of another, is raised by implication of law.

Any person who accredits another by employing him in any particular course of dealing, is bound by what has been done by such agent in the course of his usual employment, and is responsible to third parties who have dealt with the agent in reliance upon the power and authority with which he was apparently clothed by the principal.

Guarantees and policies of insurance.—An action was brought upon a guarantee which was in the hand-writing of the defendant's son, a minor, sixteen years of age. It was proved that the son had signed for the father, in three or four instances, and that he had accepted bills for him,

^(f) *Ball v. Dunsterville*, 4 T. R. 813.

^(a) As to the right of action of the principal

upon simple contracts. See ante, 257 to 262.

and this was thought by Lord Ellenborough to be sufficient *prima facie* evidence of the son's authority to sign the guarantee in question.(b)

If B. has repeatedly signed A.'s name to policies of insurance, and A. has subsequently recognized and sanctioned such signatures, the law will imply a general warrant from A. to B., authorizing the latter to sign policies of insurance in A.'s name, and A. will continue liable upon all policies underwritten by B. in the name of A. until the determination of the implied general authority has been publicly announced.(c) The express sanction and recognition of the previous signatures by the principal must of course be distinctly proved.(d)

Bills of exchange.—"If a man has a bill of exchange he may authorize another to indorse his name upon it by parol, or by a power of attorney, and when that is done, it is the same as if he had done it himself." (e) If A. has been "in the habit" of paying bills accepted by B., in his name, (f) or, has in several instances directed B. to sign his (A.'s) name to bills or notes, (g) the law will infer from the acts so permitted to be done, a general authority from A. to B., empowering the latter to make use of A.'s name, (h) and this general authority, will, by implication of law, continue until its determination has been made notorious. (i)

But an agent employed specially to sign a contract for his principal upon one particular occasion, would not be impliedly clothed with any general authority to sign contracts for his principal. And a person whose agency had been strictly confined to bill transactions, would not have any implied authority to give a guarantee. The liability of the principal is always to be measured by the nature and extent of the previous employment of the agent, and it is the duty of parties dealing with a person who professes to be an agent, but is not notoriously so, to ascertain the nature and extent of his authority before they deal with him. If they neglect so to do, and it afterwards turns out that the agent had no authority, or has exceeded his authority, the principal will not be bound, and the only remedy they can have will be against the agent himself who has misled them.

An agent entrusted with the performance of a particular duty, has an implied permission and authority to do all such incidental acts as are

(b) *Watkins v. Vince*, 2 Stark. 368.

(c) *Neal v. Irving*, 1 Esp. 61; *Brockelbank v. Sugrue*, 5 C. & P. 21.

(d) *Courteen v. Touse*, 1 Camp. 48 n.

(e) *Holt, C. J. Anon.* 12; *Mod.* 564; *Attwood v. Munnings*, 7 B. & C. 278.

(f) *Barber v. Gingell*, 3 Esp. 60; *Haughton v. Ewbank*, 4 Camp. 88; *Townsend v. Inglis*,

Holt, N. P. C. 281.

(g) *Watkins v. Vince*, 2 Stark. 368.

(h) *Davison v. Robertson*, 3 Dow. 229; *Prescott v. Flynn*, 2 M. & Sc. 18; 9 Bing. 19, s. c.

(i) *Nickson v. Brohan*, 2 Mod. 110; — v. *Harrison*, 12 id. 346; *Monk v. Clayton*, cited 10 Mod. 111; *Molloy, Lib.* 2, ch. 19 & 27; *Cunning*, 140 n.

usual and necessary for the purpose of carrying the main object of the principal into effect in the best and most convenient manner he can. Therefore, an agent employed to get a bill discounted, and not restricted as to the mode of doing it, may indorse it in the name of the principal to facilitate its being cashed, and bind the latter by such indorsement. But, if he is expressly ordered by the principal not to put his name to the bill, and has not been employed by the principal as his general agent to discount and indorse bills, the principal cannot be made liable upon it. (k) And whenever one person is sought to be charged by the acceptance or indorsement of another, in consequence of the latter having, on previous occasions, drawn and accepted, or indorsed bills in his name, it must be distinctly shown that he knew of and had sanctioned such previous acceptances or indorsements. (l)

The customary mode of indorsement through the medium of an agent is, by the agent's signing the name of the principal, adding under it "per procuration A. B.," the agent writing his own name. The arrangement of the words is quite immaterial, provided they plainly express that the indorsement is made by one man on behalf of another—as A. for B., B. by A., or by procuration of A., &c. ; but the name of the principal, whether the bill be drawn, accepted, or indorsed by the agent, must appear on the face of the bill, it must be expressed that the principal does the act through the medium of his agent, for if the agent merely signs his own name, then the principal cannot be made liable upon it. (m) When, however, a firm, in partnership trade, under the name of "A. & Co.," and such *partnership name* appears on the face of the bill, all the members of the firm are liable upon it although their individual names do not appear. (n)

The principal cannot rely upon any personal incapacity on the part of his agent to contract as a defence against an action brought by those who have dealt with such agent, for the principal who has employed and accredited the agent cannot impugn his own act in the choice he has made. Therefore, although a person under age cannot contract so as to bind himself for any thing beyond the necessities of life, he may nevertheless contract so as to bind his employer. (o). "If," observes Pothier, "a merchant has entrusted the management of his business to a minor, he is liable to

(k) *Fenn v. Harrison*, 3 T. R. 757; 4 T. R. 177.

(l) *Davidson v. Stanley*, 3 Sc. N. R. 49; *Fearn v. Filica*, 7 M. & Gr. 523.

(m) *Barlow v. Bishop*, 1 East, 432; *Fenn v.*

Harrison, 3 T. R. 761; *Bank of Scotland v. Watson*, 1 Dow. 42; *Emily v. Lye*, 15 East, 9; *Denton v. Rodie*, 8 Camp. 493.

(n) See post, ch. 18.

(o) *Watkins v. Vines*, 2 Stark. 368.

the obligations arising from the contracts made by such minor, without having any right to oppose his want of age." (p)

Subsequent ratification by the Principal.—Although no previous authority may have been given by the principal to the agent to enter into and sign the contract upon which the principal is sought to be charged, yet if there be subsequent acts of assent or acquiescence on the part of the principal, he is as much liable upon the contract as if a previous authority had been duly given upon the well known principle of the civil law, "*omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*"

If a bill or note be signed without authority by A.'s servant or agent in the name of A., a subsequent promise by the latter to pay the bill is equivalent to a prior authority (q); and if the proceeds of such a bill be applied to A.'s use or for his benefit, with his knowledge or concurrence, such application of the money obtained upon the bill would of itself amount to a subsequent sanction and ratification of the act of the agent. (r)

A. and B. being jointly interested in a quantity of oil, A. entered into a written contract for the sale of it without the knowledge of B, who upon receiving information of the circumstance, refused to be bound by it. In an altercation with the purchasers, B. subsequently acquiesced, saying, "Well, then, the oil must be delivered;" and it was held that the ratification was equivalent to a previous authority, and rendered the contract binding on B." (s)

A broker, not acting under previous authority, contracted with the plaintiffs for the purchase of wool by the defendant, and bought and sold; notes were exchanged, copies of which were subsequently shown by the broker to the defendant for his sanction. The defendant approved of the contract, but shortly afterwards he said he would have nothing to do with it, and refused to accept the wool. The plaintiff then, after having given due notice of his intention, sold the wool by auction, at a loss of 2,000*l.*, and brought an action to recover that sum, being the difference between the price which the broker had agreed that the defendant should pay for the wool, and the price at which it had been subsequently sold; and it was held, that, although the broker was not authorized to enter into the contract at the time he did so, yet as the defendant afterwards assented to

(p) Pothier, (OBLIGATIONS,) No. 450. The same rule prevails in the civil law. Dig. lib. 14, tit. 3, lex. 7.

(q) *Fenn v. Harrison*, 4 T. R. 177.

(r) *Bolton v. Hillierden*, 1 Ld. Raym. 224, 3 Salk, 285, s. c.

(s) *Soames v. Spencer*, 1 D. & R. 32.

the contract which had been entered into in his name, it was in legal effect the same as if the broker had received a previous authority. (z)

An adoption of the agency as to one part of a contract generally operates as an adoption of the whole transaction, for an act cannot be affirmed as to so much as is beneficial and rejected as to the residue. Having had the benefit of part of the contract, the principal must take upon himself the burthen of the remainder. (u) "The principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent and with all the consequences which follow from the same act, if done by his previous authority." (x)

The subsequent ratification of the contract by the principal relates back to the time when it was made by the agent, and in those cases where, by the statute of frauds, the contract is required to be authenticated by writing, such subsequent ratification renders the agent an agent duly authorized to bind his principal under the provisions of the statute at the time the contract was entered into. (y)

Implied general authority to bind the Principal.—From repeated instances of employment, the law infers, as we have already seen, the existence of an implied general authority to the party employed to bind the employer within the limits of the previously recognized dealings. Thus where the defendant had frequently employed an agent who resided in London to order goods for him on credit, and the agent at last ordered goods in the defendant's name, without his authority, and appropriated them to his own use, and afterwards absconded; and it was held that the defendant was responsible for the price of them. (z)

Servants entering into contracts on behalf of their masters in the usual course of their employment, bind the latter by their contracts, although in the particular instance they had no authority to do the act in question. If a man sends his servant with ready money to buy goods, and the servant buy upon credit, the master is not chargeable. But if the servant "usually buys for the master upon tick," and the servant buys some things

(d) *Maclean v. Dunn*, 1 M. & P. 761; 4 Bing. 722, s.c.

(u) *Wilson v. Poulter*, 2 Str. 857. *Hovil v. Pack*, 7 East, 164, 166.

(z) *Tindal, C. J., Wilson v. Tummon*, 6 Sc. N. E. 904. *Parke, B., Smahurst v. Taylor*, 12 M. & W. 554. *Doe v. Goldwin*, 2 Ad. & E. n.s. 143.

(y) 1 M. & P. 777. Si je contracte au nom d'une personne qui ne m'avait point donnée de procuration, sa ratification, la fera pareillement repeter comme ayant contracté elle même par mon ministère, car la ratification e'quipolle à procuration.—Poth. *Traité des Obligations*, No. 75.

(z) *Todd v. Robinson*, *Ryan and Moody*, 317 *Gilman v. Robinson*, id. 226.

without the master's order, yet if the master were trusted by the trader he is liable." (a)

The defendant, who was a considerable dealer in iron, and known to the plaintiff as such, sent a waterman to the plaintiff for iron on trust, and paid for it afterwards. He sent the same waterman a second time with ready money, who received the goods, and did not pay for them; and the chief justice ruled that the sending him upon trust the first time, and subsequently paying for the goods, was giving him credit, so as to charge the defendant upon the second contract. (b)

It can hardly, however, it is submitted, be contended as a general rule, that the circumstance of A. having authorized a stranger to pledge his credit on one particular occasion only, is of itself sufficient to raise an implied authority to the stranger to pledge the credit of A. a second time. (c) A distinction must be made between a particular authority given to a special agent employed upon one occasion, and a general authority raised by implication of law from usual employment. If one person employs another for a specific purpose, a particular authority only is delegated, and the employer cannot be made liable for anything done beyond the scope of the express authority given. Whether a particular authority has been extended to an implied general authority, is a question of fact dependent upon the relative situations of the parties, the number of times that the act has been repeated with the sanction of the employer, and the nature of the employment that has been cast by the principal on the agent.

A domestic servant in the constant employ of the master is naturally supposed to be clothed with a greater degree of confidence and authority than a mere stranger; and if the master has assented to his servant's dealing on credit at all, he would be held liable. (d)

"If," observes Pothier, "it be proved that I have been in the habit of paying tradesmen for the articles of dress with which they have furnished my daughter, or for the provisions of my house supplied to my cook, the tradesman would be well entitled to demand payment from me for what my said daughter, or cook might purchase in my name, unless I could prove that I had given him notice not to supply them, or at least unless what he supplied greatly exceeded what could reasonably be required for the consumption of my family. In default of his proving that I was in

(a) Holt, C. J., 1 Show. 95. *Southby v. Wiseman*, 3 Keb. 625. *Nickson v. Brohan*, 10 Mod. 111.

(b) *Hasard v. Treadwell*, 1 Str. 506.

(c) *Gilman v. Robinson*, R. & M. 227.

(d) Sir R. Wayland's case, 3 Salk, 233; 1 Ld. Raym. 255.

the habit of dealing in this way, I ought to be discharged from his demand, by showing that when I sent my daughter, or my cook to buy food, I gave them money to pay for it." (e)

An action was brought by the plaintiff against the defendant to recover the price of a quantity of hay and straw sold by the plaintiff for the use of the defendant's horses, the plaintiff proved the delivery of the hay at the defendant's stables, with bills of parcels, &c. ; but there was no evidence of his having ever seen the defendant, or of his having ever received any orders from him whatever, or any payment, or money. The defence was, that the defendant had given his servant the money for the purchase of the goods, and it appeared that the defendant kept a book, in which were entered the articles procured by the servant, and the sums advanced to him ; but the advances did not appear to have been made specifically for the purchase of the articles bought, but generally from time to time ; and Lord Ellenborough, in summing up to the jury, observed, " If the goods were taken up, and the money given *afterwards* to the servant to pay, I am inclined to think the master liable, if the servant have not paid over the money, for he has given the servant authority to take up goods upon credit. It is therefore material to see when the money was given. If the servant were always in cash before hand to pay for the goods, the master is not liable, as he never authorized him to pledge his credit ; but if the servant were not so in cash, he gave him a right to take up the goods on credit, and I think he will be liable, as the servant has not paid the plaintiff, though he may have received the money from the defendant his master." (f)

If the plaintiff has shown a want of due caution, or has trusted the servant to an improper extent, the principal of course will not be liable.

In an action for the price of butcher's meat, it appeared that the plaintiff had contracted with the defendant to serve him with meat " at 5½d. per pound, ready money ;" that the defendant's cook was in the habit of ordering meat, and of paying for it as soon as the bills amounted to a few shillings or a guinea, (the defendant giving the cook the money for the purpose) ; that this system continued for some time, until at last a new cook in the defendant's employ suffered the bills to run on until they amounted to 83l. 8s. 3d., and then ran away, the defendant having all the while paid her in the customary manner ; and it was held, that the plaintiff was not entitled to recover the amount from the defendant. " The con-

(e) Pothier, (OBLIGATIONS,) No. 456. Arrêt du Journal des Audiences, tome 5.

(f) *Rusby v. Scarlett*, 5 Esp. 76. *Pearce v.*

Rogers, 3 Esp. 214. *Gralland v. Freeman*, id. 85.

tract," observed Lord Kenyon, "was to deal for ready money, and the plaintiff, when he let the bill run on to such an amount as the sum now claimed, was giving credit to the servant and not to the defendant." (g)

A foreman intrusted with the general management of a trade or business has an implied general authority from his employer to enter into all such contracts as are usually and necessarily entered into in the ordinary conduct and management of a business. Therefore, where the foreman of a saw-mill took an order from the plaintiff for a large quantity of Scotch fir staves, and agreed to have them ready for delivery within a particular period, it was held that his master was responsible for the non-fulfilment of the contract, although no particular authority from the master to the servant to enter into that contract could be proved. (h)

If the acts of the agent have been exercised in so open and public a manner that it may reasonably be inferred that the principal must have been cognizant of them, the principal will be liable, although no express authority was in fact given. A ship-broker advertised a ship at the Royal Exchange and at the usual places as "warranted to sail with convoy;" but the vessel subsequently sailed without convoy, and was captured: the plaintiff had shipped and insured goods on board, and brought an action against the owner of the vessel to recover the damages sustained by him through the breach of the warranty; the defendant offered evidence to prove that he had never given any authority so to represent the ship; but Lord Kenyon held that the defendant was bound by the publicity of the announcement, although no actual authority had been given; it was a question between the defendant and his agent, and the public had nothing to do with it. (i)

In all these cases the existence of an implied authority to bind the principal is a question of fact to be determined by a jury from a careful consideration of surrounding circumstances; the rule of law being, that wherever the principal by his conduct has held out the agent to the parties dealing with him as having a general power to act in the premises, his acts bind the principal, and the liability of the latter upon the contract cannot be qualified by the existence of any private instructions which the agent may have exceeded. The principal cannot cut down or circumscribe the apparent general authority by secret limitations and restrictions of which the parties dealing with the agent are entirely ignorant. "It is clear that the agent may bind his principal within the limits of the authority with which he has been apparently clothed by the

(g) *Stubbing v. Heintz*, 1 Peake, 66.

(h) *Richardson v. Cartwright*, 1 Car. & Kirw.

328. *Whitehouse v. Abberley*, ib. 642.

(i) *Runquist v. Ditchell*, 8 Esp. 64.

principal in respect of the subject matter ; and there would be no safety in mercantile transactions if he could not." (*k*) So observes Pothier,— " The contract made by my agent in my name is binding upon me if he has not exceeded the power with which he was ostensibly invested. His neglect to follow my secret instructions may give me a right of action for damages against him, but cannot exonerate me from liability towards the party with whom he has contracted in my name conformably to his apparent authority, otherwise there would be no security for those who contract with absent persons through the medium of an agent." (*l*) The authority of the agent may of course be revoked at any time by the principal, so as to deprive the agent of the power of embarking in any fresh transactions after the receipt by him of the notice of revocation. (*m*) But in order to determine the liability of the principal to third parties who have dealt with a general agent in ignorance of the determination of his authority, the principal must make the revocation as notorious to the world at large as the existence of the previous general authority and employment. (*n*) If the agent was not a general agent, but had only a particular authority to enter into one or two distinct independent transactions in consequence of specific instructions, then, as he has no general continuous authority to act for the principal, no revocation of authority is needed, as there is in truth none to revoke.

An agent, unless he be the master of a ship, has no implied authority to borrow money on account of the principal, so as to render the latter responsible as the borrower, unless it can be proved that the principal had previously sanctioned such a course of dealing on the part of the agent, or had subsequently adopted and ratified the loan. (*o*)

The MASTER OF A SHIP forms an exception to the general rule in this respect, an exception founded on the necessities and exigencies of his position. " The law which generally provides for ordinary events, and not for cases of rare occurrence, considers how likely and frequent are accidents at sea, when it may be necessary, in order to have the vessel repaired, to pledge the credit of her owners, and therefore it is that the law invests the master with power to raise money, and by an instrument of hypothecation to pledge the ship if it be necessary." (*p*) He has also

(*k*) *Ellenborough, C. J., 15 East, 42. Nickson v. Brohan, 10 Mod. 109.*

(*l*) *Traité des Obligations, No. 79, No. 82.*

(*m*) *Raleigh v. Atkinson, 6 M. & W. 870.*

(*n*) *Post, ch. 20, s. 3. La commission est toujours censée durer jusqu'à ce qu'ils aient été révoqués, et que la revocation ait été connue dans le public. Pothier, Traité des Obligations,*

No. 449 ; Dig. lib. 15, tit. 4 ; Cod. lib. 2, tit. 18.

(*o*) *Hawtayne v. Bourne, 7 M. & W. 599. Pott v. Bevan, 1 Car. & Kirw. 335. Waters v. Brogden, 1 Y. & J. 457.*

(*p*) *Parke, B., 7 M. & W. 600. Weston v. Wright, ib. 396, post ch. 25.*

an implied general authority to bind the owners for necessary repairs done or supplies furnished to the vessel under his command, and by the word "necessary" is comprehended such as are fit and proper for the vessel upon her voyage, and such as a prudent owner himself, if present, might be expected to have ordered. (q) The principal, in fact, having intrusted his agent with the custody of the vessel, thereby clothes him with an implied general authority to do all such acts as are reasonable and necessary for the due conservation and preservation of the thing intrusted to his charge, and this general authority cannot be circumscribed by any private contract between the master and the owners, of which the persons dealing with the master are ignorant.

When, therefore, by articles of agreement made between the owners and the master of a vessel, it was covenanted that the master should have the sole management of the vessel, and employ her for his own sole benefit and advantage for the space of eleven years; that he should pay a rent of 36*l.* per annum at stated periods, and would at all times, at his own cost and charge, repair the vessel, her tackle, rigging, &c. It was held that the plaintiffs, who had supplied the vessel with cables by order of the master without any notice of the contract, were entitled to recover the price thereof from the owners, although at the time the articles were furnished it was not known who the owners were. It was contended in the above case that the master, being by the contract the lessee of the ship, was both owner and master; but the court said it was a private agreement and could not affect the plaintiffs, who were total strangers to the transaction. "If, indeed, a tradesman had notice of such a contract, and in consequence of it gave credit to the captain individually as the responsible person, particular circumstances of that sort might afford ground to say he meant to absolve the owners and look to the personal security of the master." (r)

The master has also, in certain cases, an implied authority to pledge the credit of the owners for such things as are absolutely necessary for the due prosecution of the voyage. Where, for example, money was required to pay the wages of the seamen, who, unless they were paid, might have refused to assist in the further navigation of the ship; it was held, that the master could pledge the credit of the owners for the necessary money. (s) So also, if it be necessary to pay harbour dues, or pilotage, or the like, in ready money, and the master has not been furnished with the necessary funds, he has an implied authority to borrow money, and to

(q) *Webster v. Seekamp*, 4 B. & Ald. 352.
Arthur v. Barton, 6 M. & W. 138.

(r) *Rich v. Coe*, 2 Cowp. 636.
 (s) *Robinson v. Lyall*, 7 Price, 592.

bind the owners by a contract for that purpose. But this authority does not usually extend to cases where the owner can himself personally interfere, as in a home port, or in a port in which he has beforehand appointed an agent who can personally interfere to do the thing required. Therefore, if the owner or his general agent be at the port, or so near it as to be reasonably expected to interfere personally, the master cannot, unless specially authorized, or unless there be some usual custom of trade warranting it, pledge the owner's credit at all, but must leave it to him, or to his agent, to do what is necessary. If, however, the vessel be in a foreign port, where the owner has no agent,—or, in an English port, but at a distance from the owner's residence, and provisions, or other things, require to be provided promptly, then the occasion authorizes the master to pledge the credit of the owner, and make him liable upon the contract. But in all these cases the things must be absolutely necessary to enable the vessel duly to prosecute the voyage. (†) And if money is borrowed, it must be borrowed upon the credit of the owners, and not upon the private credit of the master himself. (u)

Of the liability of an UNDISCLOSED PRINCIPAL. (x)

We have already seen that the right of action upon a simple contract is not confined, as in the case of deeds, to the person with whom the contract appears upon the face of it to be made; but that oral evidence is admissible to show that the contracting party was his agent, so as to give the benefit of the contract to the unnamed principal. As the latter may sue upon such a contract, so also ought he to be made liable thereon, in accordance with the maxim "*qui sentit commodum sentire debet et onus*"; and it has accordingly been held that oral evidence is admissible to show that the person making the contract was his agent, and that he was the party really interested in the matter. (Ante, 259.) This evidence "does not deny that it is binding on those, whom on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is in law the act of the principal." (y) Thus, where by a bought note containing the terms of a contract for the sale of wool, and also by the invoice, Read appeared to be the buyer of the wool, oral evi-

(†) *Arthur v. Barton*, 6 M. & W. 138—144. Abbot on Shipping, p. 116. Story on Agency, s. 122. *Evans v. Williams*, cited 7 T. R. 481, n.; Pothier, (OBLIGATIONS,) No. 448.

(u) *Thacker v. Moates*, 1 Mood. & Rob. 80.

(x) As to the right of action of the undisclosed principal, see ante, 259—261.

(y) *Parke, B., Higgins v. Senior*, 8 M. & W. 844. *Beckham v. Drake*, 9 M. & W. 96. *Drake v. Beckham*, 11 M. & W. 317, and see ante, 374.

dence was nevertheless admitted to show that Read was in reality the agent of Hart, that Hart had directed the wool to be delivered at a particular spot, and had there received it, and Hart was accordingly made chargeable upon the contract, although he did not appear upon the face of it as a purchaser. (z) So, where an English merchant, resident at St. Petersburg, bought and sold goods in this country in the name of "Edward Higginbotham," his agent, and signed contracts of purchase and sale in that name through the medium of such agent, it was held that he was responsible upon such contracts, oral evidence being admitted to show that the name "Edward Higginbotham" was in this country the adopted trading name of the St. Petersburg merchant. (a)

Oral contracts.—So also in the case of oral contracts, although an agent contracts for the purchase of goods in his own name, and apparently on his own account, so as to make himself personally liable to the vendor for the payment of the price of them, yet the principal, when once discovered, is also liable, unless he has, previous to his being called upon for payment, settled for the price in account with his agent. If the vendor, at the time he strikes the bargain, knows that the party he is dealing with is an agent, but does *not* know who the principal is, and consequently debits the agent in the first instance, he may nevertheless, as soon as he finds out the principal, claim payment of the latter. (b)

Of the EXTENT and DURATION of the LIABILITY of the PRINCIPAL.

If the principal has authorized the agent to pledge his, the principal's, credit in the commercial world, and the principal is consequently disclosed and debited in the first instance, he at once becomes responsible upon the contract, and continues liable until the creditor has received actual payment, or has taken security from the agent, having had an option of a cash payment from the latter at the time he did so. If the principal furnishes the agent with money to pay the debt, and the agent, instead of making a cash payment, gives the creditor a bill of exchange or promissory note, or a check on a banker, and the security fails, or is dishonoured, the principal is not discharged, unless it appears that the creditor knew that he might have had cash, but preferred a bill for his own accommodation. If, having had the option of receiving money, he nevertheless thinks fit to take the acceptance of the agent, he is deemed

(z) *Wilson v. Hart*, 7 Taunt. 295; 2 Smith's leading cases, 224.

(a) *Trueman v. Loder*, 11 Ad. & E. 595; 3 P. & D. 267, s. c.

(b) *Kymer v. Suwercroft*, 1 Campb. 109. *Thomson v. Davenport*, 9 B. & C. 78; 4 M. &

R. 110, s. c.

to have accepted the credit and responsibility of the latter, in lieu of that of the principal, and to have discharged the principal. (c) And if he gives his receipt to the agent as for a cash payment, when he has only obtained a bill, and the principal pays money to the agent, and alters the state of his accounts with the latter to his, the principal's, own prejudice, upon the supposition that the demand has been satisfied, as the receipt imports, the creditor cannot afterwards, in case of the insolvency of the agent, and the failure of the security he has taken from the latter, resort to the principal for payment. (d)

If, on the other hand, the principal has given no authority to the agent to make use of his, the principal's, name, and to pledge his credit, and the agent consequently deals in his own name, and is debited in the first instance, and the principal, in ignorance of the intention of the creditor to look to him for payment, has furnished the agent with funds for the liquidation of the debt, he is thenceforth discharged, and the creditor cannot afterwards, if the agent dies, or becomes insolvent with the money in his hands, resort to the principal for payment. If he has not signified his intention to look to the latter before the insolvency, or before the principal has settled for the debt, in account with his agent, he is confined to the responsibility of the agent whom he first debited in the matter. (e)

The settlement, however, must be in the ordinary course of business, and after the liability of the principal has become complete, for if the goods, according to the custom of trade, be sold under a contract to pay at a future day, the principal cannot, before the day of payment arrives, and before the liability upon the contract has accrued, settle for the price with his agent, and set up such settlement as a defence to an action brought against him by the seller. (f) The mere circumstance, moreover, of the agent's being indebted to the principal at the time of his insolvency, or of his having a balance in hand, out of which he *might* have paid the debt, is not of itself sufficient to discharge the principal. (g) It must be shown that the debt was incurred by the agent, and the state of the accounts altered to the prejudice of the principal subsequently to the incurring of the particular debt, in order that the agent might have the means of discharging it, and upon the understanding that the balance appearing in favour of the principal, and so allowed to accrue, was to be appropriated for that purpose.

(c) *Marsh v. Pedder*, 4 Campb. 257. *Strong v. Hart*, 9 D. & R. 192; 6 B. & C. 160, s. c. *Smith v. Ferrand*, 9 D. & R. 808; 7 B. & C. 19, s. c. *Tapley v. Martens*, 8 T. R. 453. *Robinson v. Read*, 9 B. & C. 449; 4 M. & R. 349, s. c. *Clarke v. Noel*, 3 Campb. 411.

Everett v. Collins, 2 Campb. 515.

(d) *Wyatt v. Marquis of Hertford*, 3 East, 147.

(e) *Thompson v. Davenport*, 9 B. & C. 78.

(f) *Kymer v. Suwersonopp*, 1 Campb. 109.

(g) *Waring v. Favenck*, 1 Campb. 85.

If, at the time the contract of sale is made, the vendor knows that the buyer, though dealing with him in his own name, and pledging his own credit, is in reality an agent, and knows also who the principal is, and, notwithstanding such knowledge, chooses to give credit to the agent and make him his debtor, he cannot afterwards resort to the principal for payment. (*h*) The vendor cannot have two concurrent debtors. When, through the disclosure of the principal, he has a power of shifting the liability, and then elects to charge the one, the other is discharged.

Of the LIABILITY of the PRINCIPAL resulting from DECEPTION and CONCEALMENT by the AGENT.

If the agent, at the time he enters into a contract on behalf of his principal, fraudulently conceals things material to be known, or expressly misrepresents facts, and commits a breach of faith with the parties with whom he contracts, to their prejudice and to the advantage of the principal, the latter will not be permitted to have the benefit of the misrepresentation, although he was himself no party to the fraud, and was unaware of the misfeasance of his agent; but the parties who have been misled are entitled to resort to him for compensation for the injury they have sustained. "The merchant is answerable for the deceit of his factor, through not *criminaliter* yet *civiliter*; for seeing somebody must be a loser by this deceit, it is more reasonable that he who employs and puts a trust in the deceiver, should be a loser than a stranger." (*i*) The consequence of holding the principal not liable in such cases would be to enable him to retain the produce of a bargain fraudulently made. (*k*) And although there may be no actual fraud on the part of the agent, yet if he makes a representation which is untrue as to the state and condition of the subject matter of the contract in an important particular material to be known, and the knowledge of which is peculiarly within his own power, or that of his principal, and obtains, in consequence of this untrue representation, a better bargain than he would otherwise have secured, the principal is not permitted to profit by this misstatement to the prejudice of the party dealing with the agent on the faith of its correctness, although the agent was guilty of no actual fraud, and fully believed at the time that he was speaking the truth. A contract made under such circumstances may be rescinded by the party who has been deceived, and the principal is bound to refund any money that he may

(*h*) *Paterson v. Gandasequi*, 15 East, 62.

(*i*) *Holt, C. J., Hern v. Nichols*, 1 Salk. 289.

Taylor v. Green, 8 C. & P. 316.

(*k*) *Wright v. Crookes*, 1 Sc. N. B. 700.

have been paid under it, and to give up any unfair advantage that he may have secured thereby; for it is his own fault if he has neglected to instruct his agent in those particulars, which are important to be known to purchasers or hirers, and concerning which they may reasonably be expected to inquire. Having intrusted him with the accomplishment of a particular task, he accords to him an implied permission to make all such statements, and give all such explanations as are necessary to be made, in order to enable him to carry the main object into effect in the usual manner.

Thus, where a ship was sold upon the faith of a written description, framed by an agent, which represented the hull to be nearly as good as when launched, whereas it was worm-eaten, and the keel was broken; and the vessel being afloat, the purchaser had no means of ascertaining the correctness or incorrectness of the description prior to the purchase, and he consequently rescinded the contract, and brought an action for the recovery of the deposit he had paid on the sale; and the agent proved that he had published the written description of the vessel without having examined her bottom, and did not know at the time he wrote the description that it was untrue; it was held by Mansfield, C. J., that his ignorance of the untruth of his representation could in nowise affect the purchaser's right to rescind the contract, and recover the portion of the purchase-money he had paid. "Is the representation," he observes, "true or false? If false, it is a fraud which vitiates the contract. What was the fact? The hull was worm-eaten, the keel was broken, and the ship could not be rendered seaworthy without a most expensive outfit. The agent tells us he framed this particular without knowing anything of the matter. But it signifies nothing whether a man represents a thing different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if, in point of fact, it turns out to be false." (1)

"If the clerk of a merchant or tradesman offers goods for sale to a customer with a misrepresentation very material to their value, which representation his master knows to be false, but the clerk supposed to be true, whereupon the customer gives double the real value of the goods, is not the contract to be dealt with in the same way as if the master himself had made the representation? And what would be the condition of men if in every case of a treaty made with an agent, the party was under the necessity of submitting to suffer by the misrepresentations of that agent about

(1) *Schneider v. Heath*, 3 Campb. 506.

the subject matter because he had not first ascertained the extent of the agent's powers? In transactions that are of a very unusual character, and where power is rarely granted to an agent to bind his principal, except within very strict limits, it may be a very necessary caution in the party dealing with the agent to know first, the extent of his authority; but in ordinary transactions who would think of suspending the treaty in order to write to the principal to make inquiries lest the agent might not have full power or information to answer them."^(m) Therefore, if an agent is sent by his principal into the market with a bill of exchange to get it discounted, and the agent in the execution of his commission indorses the bill in the name of his principal, the latter is bound by the indorsement and may be sued thereon, although he gave his agent no express authority to put his name to the instrument.⁽ⁿ⁾ So if the principal sends his horse by the hands of an agent to market to be sold, and the agent warrants the horse to be sound, the principal is liable to an action upon the warranty at the suit of the purchaser, although he gave no express authority to the agent to warrant the horse.^(o)

It has been said that if the principal gives his agent express orders not to warrant, and he nevertheless does warrant, the principal is not responsible on the warranty because the agent was not acting within the scope of the authority given him.^(p) But it is impossible for the buyer to know whether the agent is, or is not exceeding the private instructions of his principal; and it can hardly be contended, that a principal is to be allowed to have the benefit of the warranty, and at the same time to say that his agent had no power to make it.^(q) If in consequence of the representation or warranty so made, he has obtained the price of a sound horse for an unsound horse; if he has obtained 60*l.* for an animal which was not worth 10*l.*, is it to be supposed for one moment that he can be permitted to keep the 50*l.*, any more than if he had been the actual seller of the animal himself, and had made the warranty with his own mouth? It was his own fault, as Lord Holt has observed, to repose the trust in unworthy hands, and he shall not be allowed to derive a profit from the misconduct of his own servant to the prejudice of the innocent purchaser. "I very much doubt," observes Lord Kenyon, C. J. "the case alluded to by the

^(m) Lord Abinger, *C. B. Cornfoot v. Fouke*, 6 M. & W., 384, 385.

⁽ⁿ⁾ *Fenn v. Harrison*, 4 T. R., 177.

^(o) *Alexander v. Gibson*, 2 Campb. 555; *Helyear v. Hawk*, 5 Esp. 71.

^(p) *Ashurst, J.*, 3 T. R. 760.

^(q) Such secret instructions, justly observes

Pothier, "me donne bien une action en dommages contre mon procureur, pour n'avoir pas suivi les instructions secrètes que je lui avais données; mais il ne peut me dégager envers celui avec qui il a contracté en mon nom, conformément au pouvoir apparent qu'il lui a représenté." OBLIGATIONS, No. 79.

defendant's counsel, of the servant warranting the horse against the direction of his master, to such a case, I think the maxim *respondant superior* applies; and the principal has his remedy against his agent for his misconduct."^(r) So, also, observes Lord Abinger—"In the case of a servant employed to sell a horse, but expressly forbid to warrant him sound, is it to be contended that the buyer, induced by the warranty to give ten times the price which he would have given for an unsound horse, when he discovers the horse to be unsound, is not entitled to rescind the contract,"^(s) and recover back the purchase money from the principal?

But it is not every affirmation and representation, as we have already seen, (ante, 167, 168,) which will be binding upon the principal. If the fact, concerning which the representation is made, lies as much within the knowledge of the one party as the other, or even if its correctness or incorrectness may be ascertained by the party interested in knowing the truth, by the exercise of ordinary inquiry and diligence, and the agent making the statement merely says what he believes to be true, and expresses his opinion in an ordinary conversation about the matter, leaving the party dealing with him to test the accuracy of his statement by more extended inquiries, (he having the means of so doing within his reach,) there is no warranty on the part of the agent of the truth of what he states; it is understood only, under such circumstances, that he does not wilfully state that which he knows to be false, either to mislead or to lull to sleep the vigilance of the other contracting party. And if there is, under such circumstances, a defect unknown to the party making the statement, and which the other party had as good means of discovering as the agent himself, the rule of *caveat emptor* applies, and the principal is discharged.^(t)

A servant, serving in a shop and demanding only the ordinary marked price of the wares he sells, may be asked this and that question as to the fitness of the different articles for particular purposes, and his answers to such queries would, in most instances, be considered the mere expression of his own individual judgment and opinion, given by way of guidance and advice to the purchaser, and not as warranties binding the principal to the truth of his representations.

In order to charge the principal, it must not only be shown that the re-

(r) 3 T. R., 760. *Pickering v. Busk*, 15 East, 43, 45. *Nemo potest mutare consilium suum in alterius injuriam*. Dig. lib. 50., tit. 17, 75.

(s) *Cornfoot v. Fowke*, 6 M. & W. 358. "The only real difference," observes Alderson,

B., "between Lord Abinger and the rest of the Court, in *Cornfoot v. Fowkes*, was whether the particular representation there made was part of the contract." 3 Ad. & E. n. s., 73.

(t) *Wilson v. Fuller*, 3 Ad. & E. n. s. 72; *Collins v. Evans*, 5 Ad. & E. n. s. 828.

presentation was made at the time the contract was entered into, but that it formed part of the foundation on which the contract rests. "What the agent said at the time of a sale respecting the things sold, is evidence against the principal, but not what he has said at another time."^(u) Therefore if an agent employed by his principal to find parties willing to contract, and then send them to the principal to conclude the bargain with him, makes in the course of conversation with them, statements and representations respecting the subject matter of the contract, which are not afterwards included in the contract entered into with the principal himself, the latter will not be bound by them. If the parties wish to have the subject matter of the contract handed over to them in any particular state or condition, and at preliminary conversations between themselves, and the agent, the latter represents it to be in the state they wish it to be, believing it, at the time, to be so, and the parties afterwards conclude the bargain with the principal in person, without saying anything at all about the assurances they have received from the agent, or taking care to incorporate them into the contract they then enter into with the principal, they cannot afterwards treat such representations as forming any part of that contract so as to charge the principal with the fulfilment of them.

A house agent was employed to obtain a tenant for a house and premises, and in going to show the house to the defendant who had applied for it, he was asked if there was any thing objectionable about the house, to which the agent replied, "Nothing whatever." After this conversation, the parties differed about the rent, and the treaty was broken off. Subsequently, however, it was renewed, and after some negotiation, the rent, which had originally been put at 450 guineas, was reduced to 375*l.*, and the defendant then expressed his willingness to take the house. The matter was then referred to the principal, and a contract for the letting and hiring of the house was subsequently entered into between the principal himself and the defendant, which contract made no mention of the previous representation or assurance of the agent, nor was the principal aware at the time he executed the contract, that any such assurance had been given, and it was held that as the defendant had neglected to make it a term of the contract, which he afterwards entered into with the principal, the latter could not be held bound by the representation.^(x)

Fraudulent concealment and deceit on the part of the principal and not of the agent—If a principal, desirous of selling or letting property, knows

(u) *Helyear v. Hawke*, 5 Esp. 78.

Strods v. Dyson, 1 Smith, 400.

(x) *Cornfoot v. Fowke*, 6 M. & W., 358;

of a latent defect, "and expressly authorizes his agent to state that it does not exist, or to make any statement of similar import; or if he purposely employs an agent ignorant of the truth, in order that such agent may innocently make a false statement, believing it to be true, and may so deceive the party with whom he was dealing; in either of these cases he would be guilty of a fraud." The representation of the agent, made under such circumstances, "would be the representation of the principal, and, coupled with his knowledge of its falsehood, would, doubtless, be a fraud."^(y)

In contracts for the letting and hiring of landed property, there is no implied warranty or undertaking on the part of the lessor that it is fit for the purpose for which it is let, or that it is in any particular state or condition at the time of the demise;^(z) and it has accordingly been held by the Court of Exchequer, that although a principal who employs an agent to let a house knows that the house is encumbered with a nuisance of so serious a nature as to render it an unfit place of residence for any family of respectability, yet he is not guilty of any fraud in the eye of the law by neglecting to make known the existence of the nuisance to the agent, and through him to the parties who contract for the hiring of the house. Thus, where a ready furnished house, situate in a fashionable quarter of London, and apparently suitable for the accommodation of a family of respectability, adjoined a brothel of the very worst description, and the principal was fully aware of the existence of the brothel, and of the extent of the nuisance, but neglected to mention it to the agent, and the latter, in ignorance of its existence, procured a tenant who agreed with the principal to take the house at a rent of 875*l.* per annum, which rent never could have been secured if the tenant had, at the time he entered into the contract, known of the brothel next door, it was held that the passing over in silence, by the principal, of this nuisance, was not in contemplation of law a fraud upon the tenant, rendering the principal responsible for the concealment.^(a) The common law does not seem to take any note of latent defects in realty, and if there has been no express misrepresentation by the principal as to the state and condition of the property, and no actual attempt or contrivance to conceal and keep out of view a defect, there is no deceit nor any breach of contract.

A very different doctrine prevails in the civil and continental law upon

^(y) Per Rolfe, B., and Parke, B. *Cornfoot v. Fowkes*, 6 M. & W. 370, 374. *Wilson v. Fuller*, 3 Ad. & E., n. s. 68, 75, 1009.

^(z) *Hart v. Windsor*, 12 M. & W. 68, post, ch. 22.

^(a) *Cornfoot v. Fowkes*, 6 M. & W. 358.

this subject,^(b) and also in our own law as regards the letting and hiring and sale of moveable chattels. Thus, as we have already seen, in the case of a sale of goods, the law implies a promise from the vendor to the purchaser, that he does not at the time of the sale know of any latent defect materially lowering the value of the goods in the market, and the passing over in silence of a defect known to the vendor, and resting peculiarly within his knowledge, and which ought in good faith to have been disclosed to the purchaser, is equivalent in contemplation of law to an express representation, or even a warranty of its non-existence. (Ante 219, 220, et seq.) And if a principal employs an agent to sell a moveable chattel, and keeps such agent in ignorance of a defect which ought to have been made known, and thereby either causes the agent to make a statement which is contrary to the truth, or to leave the defect undisclosed, and the principal thus obtains the produce of a bargain which could not have been secured if the truth had been known, he is as much responsible for the concealment to the parties who have been deceived and injured as if he had completed the bargain himself without the aid or intervention of any servant or agent at all in the business. If, for example, the principal sends his agent into the market with a bill of exchange which he knows at the time to be a worthless security, and tells his agent not to indorse it, as he does not intend to make himself liable upon it, but to sell the security for what he can get for it, and the agent believing it to be a good bill because he has not been told the contrary by his principal, either expressly represents it to be a good security, or says nothing at all upon the subject, but gets cash for it upon the faith that there is no fraud or concealment in the matter, the principal cannot retain the money he has procured through the medium of such a transaction, but renders himself liable to an action at the suit of the party who has been defrauded of his money. "It is extremely clear that if the holder of a bill of exchange sends it to market without endorsing his name upon it, neither morality nor the laws of this country will compel him to refund the money for which he has sold it, if he did not know at the time, that it was a good bill. If he knew the bill to be bad, it would be like sending out a counter into circulation to impose upon the world instead of the current coin, and there is no doubt but that he would be obliged to refund the money."^(c)

So if an agent is employed to let out a moveable chattel, such as a car-

(b) Dig. lib. 19; tit. 2; Pothier, (LOUAGÉ,) No. 22, 148. Vin. Com. 758, 766; Cicero de officiis lib. 3, 13, p. 1246, ed. Amst. 1661, cited by Ld.

Abinger, 6 M. & W. 380.

(c) Ld. Kenyon, C. J.; *Fenn v. Harrison*, 3 T. R. 759.

riage or a ship, there is an implied promise on the part of the principal, that he is not aware of any latent defect which renders it unfit for use, and if the hirer sustains an injury from any defect, and this defect was known to the principal at the time he intrusted the chattel to his agent to be let, the principal is liable to an action for damages, although the agent from whose hands the thing was received was entirely ignorant of the unfitness of the article for use at the time he contracted on behalf of his principal with the hirer for the use of it. (Post, ch. 22.)

SECTION III.

OF THE LIABILITY OF THE AGENT UPON SIMPLE CONTRACTS.(a)

Agreements and undertakings in writing by an agent whose representative character is not disclosed upon the face thereof are binding upon the agent, whether he was, or was not known, at the time that he entered into the contract and signed the writing, to be acting as agent on behalf of a principal. If he enters into the agreement or undertaking merely as the mouth-piece of a third party, and neglects to declare the agency, and qualify his liability upon the face of the contract, he is personally responsible, and is not permitted to show, through the medium of oral evidence, that the other contracting party knew him to be merely an agent, and knew who his principal was, at the time he signed the contract. Such evidence is admitted, as we have already seen, in order to enable a creditor to get at the real principal, and to charge him with the burthen of the performance of the contract, but it is never admitted for the purpose of *discharging* the agent from an agreement or undertaking which is absolute and unqualified upon the face of it, and in which the agent has thought fit to represent himself as the really contracting party.(b) “If a factor or servant buyeth goods generally, and doth not upon the face of the contract note declare that he buyeth only as factor, or servant, he is chargeable in his own

(a) As to the right of action of the agent upon simple contracts, see ante, 262 to 265.

(b) *Magee v. Atkinson*, 2 M. & W. 442; *Jones v. Littledale*, 6 Ad. & E. 490, 1 N. & P. 679, n. c.; *Hendray v. Hodgson*, 5 Esp. 228.

right.”(c) “To allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done. And this view of the law accords with the decisions not merely as to bills of exchange signed by a person without stating his agency on the face of the bill, but as to other written contracts.”(d)

An auctioneer sold an estate by public auction, and immediately after the sale entered into and signed an agreement with the purchaser to the effect following :—“I, the undersigned William Gutteridge, do hereby acknowledge to have this day sold by auction, and I, the undersigned John Gray, do acknowledge to have this day purchased, the hereditaments and premises comprised in Lot 1 ; and we do hereby mutually agree to complete such sale and purchase agreeably to the annexed conditions of sale. As witness, &c.” The vendor being unable to make out a good title, an action was brought by the purchaser against the auctioneer, when it was contended that the latter was known by the purchaser at the time of the sale to be the mere agent of the vendor, and that the plaintiff’s remedy consequently was against him and not against the auctioneer, but per LORD TENTERDEN, C.J.—“Assuming the defendant to have been the agent of the vendor, still it is quite clear that he, like any other agent, had power, if he chose, to bind himself as a principal ; and it seems to me that he has done so, for the contract which he signed states that he acknowledges to have sold the estate, and that he agrees to complete such sale, agreeably to the conditions of sale. Such being the language used by the defendant, I consider this contract as one made between the plaintiff and defendant as principals.”(e)

We have before seen that an agent may sue upon such a contract (ante, 262): he may naturally expect, therefore, to be liable to be sued thereon.

Bills of Exchange and Promissory Notes signed by an agent without any qualification of his liability, and without any declaration or disclosure of the agency upon the face of the instrument, are binding upon the agent, and he cannot, as we have already seen, (ante, 376,) discharge himself from liability by showing that at the time he accepted or indorsed the bill or made the note he was known to be merely an agent, having himself no interest in, and deriving no benefit from the transaction.

The defendant, as agent of the Durham Bank, at Hexham, was in the

(c) *De Gelder v. Savory*, 2 Keb. 812. So by the French law, “ Dans tous les engagements que le déposant contracte en son propre nom pour les affaires auxquelles il est préposé, il s’oblige comme débiteur principal, et il oblige en memo

temps son commettant comme débiteur accessoire.”—*Pothier*, (OBLIGATIONS,) No. 448.

(d) *Parke, B., Higgins v. Senior*, 8. M & W. 844, 845.

(e) *Gray v. Gutteridge*, 1 M. & R. 618.

habit of drawing bills on account of such bank upon the firm in London, and the plaintiff, being desirous of procuring a bill upon London, sent a sum of money to the defendant for the purpose of obtaining one, and the defendant drew in his own name without qualification of his liability upon the house in town, directing the amount to be placed to the account of the Durham Bank, and it was held that the defendant was personally liable as the drawer of the bill, although the plaintiff *knew* that the defendant had received the money, and drawn the bill on account of the Durham Bank, to which the defendant had paid over the money he had received from the plaintiff. (f)

Effect of a declaration of the Agency upon the face of the contract.—

But if the contract, is on the face of it, expressed to be accepted, made, or indorsed by the acceptor, promisor, or indorser, for and on behalf of a third party, who is named upon the face of the instrument, it does not impose any liability upon the party so making or indorsing it, and who thus declares his representative character, provided he had authority from the principal or third party to do what he has professed to do, and has bound the latter by the contract. "If a bill be addressed to the master and underwrote by the servant; there undoubtedly the servant would not be liable, but his acceptance would be the act of his master." (g)

Richard Mitchell signed a note of hand promising to pay a sum of money "for John Clarke, Richard Mitchell, Joseph Phillips, and Thomas Smith," and it appeared that he was the agent of the last named parties, and made the promise with their sanction and authority, and it was held that he could not be sued alone upon the note, but that all the four who had made the promise through the medium of Richard Mitchell their agent were the parties to be made defendants in an action upon the instrument. (h) So if an agreement or undertaking is expressed on the face of it to be made by the agent for and on behalf of a named principal, it does not impose any individual or personal liability upon the agent, provided he had authority to enter into the contract, and has contracted so as to bind the principal thereon. It is not necessary that the agent should be expressly declared to be an "agent" on the face of the contract; it is sufficient if it appears from the general context of the written instrument that he is dealing in that character, and that he intends to bind a named principal and not himself by the contract. (i)

(f) *Leadbitter v. Farrow*, 5 M. & S. 345.

(g) *Per Cur. Thomas v. Bishop*, 2 Str., 955.
Wilson v. Barthrop, 2 M. & W. 865.

(h) *Ex parte Buckley*, 14 M. & W. 469.

(i) *Downman v. Jones*, 15 Law J., n. s. (Q.B.) 228. So by the French law, "Lorsque le préposé contracte dans la qualité de facteur ou de

fondé de procuration de son commettant, ce n'est pas lui qui contracte, c'est son commettant qui contracte par son ministère."—*Pothier*, (Obligations,) 449. La procuration fait regarder celui qui a donné la procuration comme contractant lui-même par le ministère de ce procureur.—*Ib.* No. 74.

Goods were accepted by an agent under a bill of lading which made them deliverable unto him "for the London Gas Company, or to his assignees, *he* or they paying freight for the said goods, ten shillings per ton in cash for true delivery," and the defendant on the delivery of the goods promised to pay the freight in two months; and it was held that as the defendant appeared upon the face of the bill of lading to be merely the agent of the London Gas Company, and had received the goods in that character and not on his own account, the promise to pay the freight must be taken to have been made by him in his character of agent for the company to pay the freight on their account, and not a promise to be personally responsible for it. (*k*)

An action was brought upon a written promise, addressed by the defendant to the plaintiff in the terms following:—"Your bill of charges in this matter, (the Pembrey works,) amounting to 527*l.* 5*s.*, I undertake (on behalf of Messrs. Esdaile and Co.,) to pay, and will arrange with you the time and mode immediately after the dividend meetings . . ." From the letters and documentary evidence in the cause, it plainly appeared that this promise was made by the defendant in the course of a negotiation which he was employed by Messrs. Esdaile and Co. to conduct with the plaintiff, that it had been arranged through the instrumentality of the defendant, acting on behalf of Messrs. Esdaile and Co., that certain deeds should be given up to them, and a certain claim made by the plaintiff abandoned, and that Messrs. Esdaile and Co. should pay to the plaintiff the sum of 527*l.* 5*s.*, and that the defendant then wrote the letter, promising to pay the money on behalf of Messrs. Esdaile and Co., as previously mentioned; and the court held that the necessary inference from the language of the letters and the nature of the transaction was, that the undertaking was an undertaking given by the defendant, in the course of his employment, as the agent of Messrs. Esdaile, and within the scope of his apparent authority, with the view of binding them and not himself thereby; that it was so understood between the parties themselves, and that the defendant therefore could not be charged with the payment of the money, unless it could be shown on the part of the plaintiff that there was not, in point of fact, any such agency or authority as appeared upon the face of the letters, or that the authority, such as it was, had been so far exceeded by the defendant as to render Messrs. Esdaile and Co. irresponsible. (*l*)

An estate was put up to sale by auction upon certain conditions of sale, providing that the purchaser should pay down a deposit, and the auction

(*k*) *Amos v. Temperley*, 8 M. & W. 805.

(*l*) *Downman v. Jones*, Exchr. Chr.; 14 Law

J., N. S. (Q.B.) 228; 9 Jurist, 457, 458; 4 Ad.

& E., N. S., 235 n.

duty immediately, and sign an agreement for payment of the remainder of the purchase money at a day certain, on having a good title, and that the vendor should prepare and deliver to the purchaser an abstract of title, and the plaintiff became a purchaser upon these conditions, and the defendant, the auctioneer, then subscribed a memorandum indorsed on the particulars of sale, to the following effect: "I. E. Driver, as agent for the vendor, hereby agree to sell to the above-named R. H. Gaby, (the plaintiff,) the lot thirty-eight, referred to in the above memorandum, and upon the terms therein mentioned;" and the sale not having been completed through the default of the vendor, in not delivering an abstract of title, the plaintiff brought an action against the defendant, the auctioneer, and contended that the latter, by signing the memorandum, had made himself personally liable as a principal; but the court held that it was impossible to contend that the auctioneer, by signing such a memorandum, had personally engaged to make out a good title to the estate, and to be responsible for all the consequences attendant upon a defective title. He had undertaken in the character of an auctioneer and agent, had expressly stated on the face of the written memorandum that he was agent for the vendors, had acted purely within the scope of his authority, had bound the principal by his acts, and that the remedy therefore for the breach of contract was against the principal and not against his servant. (m)

So where an auctioneer, being employed to sell an estate by the owner, entered into an agreement with the purchaser for the sale of it, which was expressed to be made between Lavender, (the auctioneer,) "as agent for and on behalf of Samuel Randall (the owner) of the one part, and Spittle (the purchaser) of the other part; whereby Lavender, (the auctioneer,) for the said Randall, (the owner,) his heirs, executors, and administrators, and every of them, did promise that he, the said Charles Lavender, (the auctioneer,) his heirs, &c., would make out a title, and this agreement having been signed by the auctioneer and purchaser, the owner, with the knowledge and consent of the purchaser, afterwards added, "I hereby sanction this agreement, and approve of C. Lavender (the auctioneer) having signed the same on my behalf,"—to which ratification he appended his own signature, and it was held that the agreement and ratification might be considered as one transaction, and that it manifested an understanding by all parties that the owner and not the auctioneer was to be personally liable upon the contract. (n)

Liability of the agent on implied contracts. — If an agent orders

(m) *Gaby v. Driver*, 2 Y. & J. 555, 558.

(n) *Spittle v. Lavender*, 5 Moore, 270.

goods, or enters into dealings and transactions in his own name on behalf of an unknown or undisclosed principal, he is, of course, himself personally liable in respect of such transactions, unless the party with whom he has contracted has discovered the principal and elected to charge him in preference to the agent. "If an auctioneer sells commodities without saying on whose behalf he sells them, the purchaser is entitled to look to him personally for the completion of the contract." (o) If the agent contracts in his representative character avowedly as agent on behalf of a named or known principal, he is not himself personally responsible upon the contract, unless he dealt without authority, or unless he has himself some special interest in the subject matter of the contract as presently mentioned and described.

The law, as before observed, will not raise an implied contract with the known agent in respect of his dealings and transactions in a representative character on behalf of a named principal; the contract is the contract of the principal, not of the agent; the latter cannot himself sue thereon, neither can he be sued. "If a servant do not by express words bind himself, and the thing come to the use of his master, he is not chargeable." If the mere act of ordering goods were to make the party ordering them liable, no man could give an order for a friend in the country who might request him to do it without risk to himself. Wherever an order is given by one person for another, and he informs the tradesman who that person is for whose use the goods are ordered, he thereby declares himself to be merely an agent, and there is no foundation for holding him liable." (p)

The defendant employed the plaintiff, who was a paper-hanger, to do a job of work at Tippell's house, and informed him it was "on Tippell's account," and the court held that the defendant could not be charged with the price of the work. (q)

If a person be placed in a situation rendering his character of agent notorious, he cannot be made personally liable in respect of his dealings and transactions in the usual course of his employment. Thus the surveyor of a turnpike road, in the employment of the commissioners for highways, is not personally liable to the labourers employed in the repair of the road for their wages, for the contract is by implication of law made with the commissioners. (r) Neither is the solicitor under a commission

(o) *Ld. Kenyon, Hanison v. Roberdeau*,
Peake, N. P. C. 163. *Owen v. Gooch*, 2 Esp.
 568.

(p) *Per Ld. Kenyon, Owen v. Gooch*, 2 Esp.

568.

(q) *Owen v. Gooch*, 2 Esp. 567.

(r) *Pochin v. Pawley*, 1 W. Bl. 670.

of bankruptcy responsible to a messenger nominated by him for the amount of such messenger's "bill of fees," inasmuch as the messenger must be taken to be aware that the solicitor is not a principal in the transaction, and upon the opening of the commission, may ascertain who the petitioning creditor is. (s) Neither can a witness, who has been subpoenaed to give evidence in a cause, conducted by an attorney, maintain an action against the latter for his expenses of attendance, as it is notorious that the attorney is a mere agent, and the witness knows that he attends to give evidence not for him but for his principal. (t)

If, however, the agent himself has any interest in the subject matter of the contract; if he acts for himself, as well as for third parties whom he professes to represent, he cannot escape from liability under a plea of agency. In such a case he is both principal and agent, and is responsible accordingly. (u)

Masters of ships, being something more than mere agents, are personally responsible in respect of stores and necessaries furnished for the use of vessels under their command, and for repairs done by their orders, unless they expressly guard themselves from personal liability, and confine the credit to the owners of the vessel. (v)

LIABILITY of a person who contracts as AGENT, but without AUTHORITY, from his SUPPOSED PRINCIPAL, and of an AGENT who contracts on behalf of an IRRESPONSIBLE PRINCIPAL.

If the party professing upon the face of the contract to be an agent is not in truth an agent, and has had no authority from his principal to enter into that contract, he is himself personally responsible upon it as the really contracting party. "Wherever a party undertakes to do an act as the agent of another, if he does not possess any authority from the principal, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the other contracting party." (x) . . . "The courts have held, that where a party, making the contract as agent, *bonâ fide* believes that such authority is vested in him, but has, in fact, no such authority, he is still personally liable. In these cases, it is true, the agent is not actuated by any fraudulent motives; nor has he made any statement which he knows to be untrue. It is a wrong, differing only in degree but not in its essence, from the former case, to state as true

(s) *Hartop v. Jukes*, 2 M. & S. 438.

(t) *Robins v. Bridge*, 3 M. & W. 118.

(u) Post, chs. 18, 19.

(v) *Rich v. Coz*, 2 Cowp. 639.

(x) Story on Agency, ch. 10, s. 264. *Jones v. Downman*, 4 Ad. & E., n. s., 239. *Downman v. Jones*, 14 Law J., n. s., (Q. B.) 228; Bac. Abr. (Agreements), 133; Holt, 309.

what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct. And if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for its consequences." (y)

An agreement was made between the plaintiff, master of the brig *Sir Alexander Mackenzie* of the one part, and the defendant, "consignee and agent of the above brig and cargo, on behalf of Mr. Meirelles, merchant of Liverpool, of the other part," whereby it was agreed that the brig should proceed upon a certain voyage, &c. The voyage having been performed, an action was brought against the defendant for the freight, and the plaintiff having proved that the defendant had never been authorized by Mr. Meirelles to enter into that agreement, and that the latter had refused to be bound by it, it was held that the contract was the personal contract and undertaking of the defendant upon which he was himself personally liable. (z)

If an agent, appointed for some special purpose, and acting within a limited authority, so exceed that authority by the contract made by him as to render the principal irresponsible upon the contract, the agent will be himself personally responsible. Thus, where a broker, who had received special directions from his principal to purchase a particular kind of silk, purchased an article of a different description and of inferior quality;—it was held that the principal should not be bound by the contract, but that the agent should be liable at the suit of the sellers to an action for the loss sustained by them upon the resale. (a)

But if the other contracting party chooses to give credit to an irresponsible principal, acting through the medium of an agent, taking his chance of payment from such principal, and it be manifestly intended that the agent's credit shall not be pledged, the agent will not, in such a case, be liable upon the contract. If the extent of the authority of the agent is as much known to the party contracting with the agent, as to the agent himself, and it is manifest that the former intended to rely on the subsequent ratification of the contract by the principal, and was not led into the contract by any mistatement or misrepresentation on the part of the

(y) *Alderson, B., Smout v. Ilbery*, 10 M. & W. 10; and see ante 408.

(z) *Kennedy v. Gouveia*, 3 D. & B. 503.

(a) *East India Company v. Hensley*, 1 Esp. 111.

agent respecting his power and authority in the matter, the agent will not incur any personal liability upon the contract. "In all the cases it will be found that the agent" (where he has been held liable by reason of defective authority) has either been guilty of some fraud, has made some statement which he knew to be false, or has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party as would enable him equally with himself to judge as to the authority under which he proposed to act." (b) "If at the time of the contract the agent were to declare that he had no authority, but that he thought his principal would ratify the act as for his benefit; and at the same time he should declare that he only acted as expressive of his opinion and belief, and did not intend to bind himself personally, if the principal should not ratify it, and this was fully understood and agreed to on the other side; in such a case, there would not seem to be any legal ground upon which, in case of a non-ratification by the principal, the agent, thus acting *bonâ fide*, could be held personally responsible." (c)

Upon this principle, as well as upon high grounds of public policy, it has been established that the law will raise no implied promise upon which an action can be maintained against a government agent or officer acting in his public character within the scope of his employment. Thus the governor of a fort, or of a colony, is not personally answerable for stores ordered by him for the use of government, (d) neither is a military commissary, (e) nor the captain of a troop, liable for forage supplied to the army or to the troop, (f) nor for provisions furnished to the men. (g) The first Lord of the Treasury is not personally answerable for the expenses incurred by a person employed in raising a regiment for the service of government, (h) nor is the Secretary of War liable to a retired clerk of the War-office for his retired allowance, although such allowance was included in the yearly estimates drawn for by such secretary, and received by him as applicable to such specific allowance, there being no duty from which the law will imply a promise from the secretary, who is the agent and officer of the crown, and responsible only to the crown for the due execution of the trust committed to him. (i)

In all these cases, the nature and extent of the agent's authority are as

(b) Alderson, B., 10 M. & W. 10.

(c) *Story's Agency*, ch. 10, s. 265; 4 Ad. & E., n. s., 239, n. 14 Law, J., n. s., (Q. B.) 228. *Smout v. Ilbery*, 10 M. & W. 12.

(d) *Macbeath v. Haldimand*, 1 T. R. 180.

(e) *Macbeath v. Haldimand*, 1 T. R. 180.

(f) *Rice v. Chute*, 1 East, 579.

(g) *Myrtle v. Beaver*, id. 135.

(h) *Macbeath v. Haldimand*, 1 T. R. 180.

(i) *Gidley v. Lord Palmerston*, 7 Moore, 91.

much known to the party with whom he contracts as to himself, and it is obvious that in these public transactions the individual credit of the agent is not intended to be pledged, but that the parties who contract with him rely on the honour and good faith of the irresponsible principal. (*k*)

Liability of the AGENT in respect of MONEY RECEIVED by him in the NAME of his PRINCIPAL.

It is a general rule of law, that if money be paid to a known agent for the use of his principal, an action for money had and received cannot be sustained against the agent if it appears that the principal has the least colour of right to the money. (*l*) The courts will not try the right of the principal in an action against the agent.

An action was brought against a collector to recover back a customary payment for tithes; but the plaintiff was nonsuited on the principle "that the right to an inheritance shall not be tried in an action for money had and received brought against the receiver or collector. (*m*)

The receiver of Lady Windsor having demanded and received a quit rent claimed to be due to her, an action was brought against him to recover back the money, on the ground that no quit rent was due; but it was held that the action ought to have been brought against Lady Windsor herself and not her agent, and that the right to the quit rent could not be determined in an action against the latter. (*n*) In these cases, too, the known agent having received the money on behalf of the principal, and for his use, is accountable to the latter for it, and the agent could not, in an action brought against him by the principal, set up a *jus tertii*. (*o*) The maxim *respondeat superior*, therefore, applies, and the agent, whether he has paid over the money, or whether he has not, is answerable to the principal alone. (*p*)

An attorney, being employed by a clergyman to collect his tithes for him, went from home, leaving his clerk at the office, who, being authorized to receive payments in his master's absence, received a sum of money for tithes, and signed a receipt acknowledging that he had received for his master, the attorney, 9*l.* "composition for tithes, due to the Rev. J. S., the clergyman, at Lady Day." The attorney became bankrupt and never returned, and his clerk having refused to pay over to the clergyman

(*k*) *Smout v. Ilbery*, 10 M. & W. 11.

(*l*) *Staplefield v. Yewd*, Bull N. P. 133.

(*m*) *Staplefield v. Hugh*, cited 4 Burr. 1986.

(*n*) *Sadler v. Evans*, 4 Burr. 1985. *Greenward v. Hurd*, 4 T.R. 553.

(*o*) *Dixon v. Hammond*, 2 B. & Ald. 313.

Roberts v. Ogilby, 9 Pr. 269. *Hardman v. Willcock*, 9 Bing. 382, n.

(*p*) 4 Burr. 1987.

the 9*l.*, (which he had not paid over to his master the attorney, or to his estate,) the clergyman brought an action against him to recover the money. But the court held that the action could not be sustained, inasmuch as the clerk had received the money as the agent or servant of the attorney, and was bound to pay it over to him, or to his assignees. (*q*)

A managing owner of a ship employed certain agents for general purposes, and amongst others to receive and pay monies on account of the ship. He kept a general account with them, and also a separate account as managing owner, of the ship's disbursements and earnings, and the account between himself and his co-owners. In order to obtain the freight earned by the vessel on a voyage to India from the East India Company, it was necessary that a receipt signed by the managing owner, and by one or more of the other owners also, should be given for the money due; and upon a receipt of this description, signed by the managing owner and one of the other owners, the agents received 2,000*l.* and upwards from the East India Company, which was placed by the agents to the credit of the managing owner in his account with them. This managing owner died, and after his decease an action was brought by the surviving joint owners of the ship against the agents to recover from them the balance appearing to be due on that account as money had and received to their use. But the court held, that although the concurrence of one of the plaintiffs as owners was necessary, in order to enable the agents to receive the money from the East India Company, yet that it was received by the defendants as the agents of the managing owner, and they by such receipt became accountable to him for it during his life, and to his executors after his decease; that the transaction was in effect the same as if the plaintiffs and the managing owner had received the money and it had been then handed over to the managing owner who had then placed it in the defendant's hands on his own account, and that if the plaintiffs had been unwilling to trust the managing owner with the money, they should have raised a separate account in their own names as "owners of the ship" with the agents; and then the money would have been received by them to their use, and the agents would have been responsible to them for its application, but not having done that, they could not treat the agents as their debtors. (*r*)

In an action against a clerk to the guardians of a poor law union for

(*q*) *Edden v. Read*, 3 Campb. 339. *Stephens v. Badcock*, 3 B. & Ad. 354. As to payments by the agent to the principal, when the latter is in insolvent circumstances, see *White v. Bart-*

lett, 9 Bing. 378; 2 M. & Sc. 520, s. c. *Hardman v. Willcock*, 9 Bing. 408, 382, n.

(*r*) *Sims v. Brittain*, 4 B. & Ad. 375; 1 N. & M. 594, s. c.

money had and received by the latter for the use of the plaintiff, it appeared that the latter had been indicted for disobeying an order of sessions for the maintenance of a bastard, and had compromised the matter and paid to the clerk a certain sum on account of costs and for the maintenance of the child; that the order of sessions had subsequently been found to be defective and void, and that the plaintiff had thereupon brought his action against the clerk to recover the money he had paid him; and it was held that the clerk was not liable to refund the amount. (s)

If the payment to the agent is void *ab initio*, so that the money never was received by him for the use of his principal, and he is consequently not accountable to the latter for it, he is bound to refund the amount, if he has not actually paid it over at the time he receives notice of the mistake. Thus, if money, through a mistake of fact, be paid to an agent, and placed by him to the account of his principal, but not paid over, an action lies against him for the recovery of the money, and the mere passing such money in account, making rests without any new credit given, fresh bills accepted, or further sum advanced to the principal in consequence of it, is not equivalent to a payment of it over.

An insurance broker, having effected a policy of insurance for his principals, subsequently gave notice of a loss to the underwriter, who, imagining the loss to be fair, paid to the broker the sum of 2,100*l.* as due upon the policy. The broker immediately passed the whole sum in account with his principals, and gave credit to them for it against a sum of 8,000*l.*, in which they stood indebted to him. Shortly afterwards it was discovered that the loss was a foul loss, and it was held that the broker was bound to refund the money. (t)

A bar of silver having been forwarded to an agent to sell, the latter sold it to the plaintiffs at a price proportioned to the quantity of silver in the bar, which was to be ascertained by the assay of the assay-master. The bar having been assayed, the plaintiffs paid the defendant 88*l.*, the supposed value of the silver, according to the assay-master's certificate, and the defendant then informed his principal of what had been done, and credited him in his account with the amount. Subsequently it was discovered that a mistake had been made in the assay, and that the bar contained much less silver than the assay-master had certified, whereupon the plaintiffs applied to the defendant for a return of the money, offering to return him the silver, but the defendant refused on the ground that he had forwarded

(s) *Goodall v. Lowndes*, 6 Ad. & E., n. s., 464.

(t) *Buller v. Harrison*, 2 Cowp. 565. *Bishop v. Eagle*, 10 Mod. 23.

his account to his principal, in which he had credited him the full sum ; it was held, however, that as the money had not been actually paid over, the defendant was bound to refund it. (*u*)

But if the agent has *bonâ fide* handed over the money to his principal, or settled for it in account with the latter, without notice not to do so, he cannot be called on to pay it back again. The mere intermediate hand is not responsible unless he be " caught with the money in his possession." (*x*)

The doctrine, however, that the receipt of the agent is the receipt of the principal does not extend to the case of a wrong doer, and if an agent gets money into his hands by his own illegal act, he cannot discharge himself from the liability by paying it over to his principal. (*y*)

A gaoler, with the sanction of the justices, let a room in the prison to a prisoner at a rent of a guinea a week, and the transaction being illegal, the prisoner subsequently brought an action against the gaoler for the recovery of the weekly sums paid to him ; and it was held that the gaoler was responsible for the repayment of the amount he had received, although he had paid it over to the justices at the quarter sessions. (*z*)

An attorney brought an action and recovered a sum of money on the retainer of a man who professed to act under a power of attorney from the party really entitled, but which power of attorney was forged ; and an action having been brought against the attorney for the recovery of this money, it was held that the fact of his having paid it over to his false employer constituted no answer to the action. (*a*)

If an agent obtains money in the name of his principal by fraud, extortion, or deceit, if he detains goods which he has no right to detain, and compels the owner to pay him money as the price of their restitution, he cannot shelter himself from responsibility on the ground that he is an agent. " A payment to A., expressly as the agent of B., for the purpose of redeeming of goods wrongfully detained by B., and a receipt by A. expressly for B.," will still give " a right of action against A. for money had and received." (*b*)

A sheriff having, in obedience to a writ from the Court of Exchequer, issued his warrant to his bailiff requiring the latter to levy certain small

(*u*) *Cox v. Prentice*, 3 M. & S. 344.

(*x*) *Horsfall v. Handley*, 2 Moore, 5 ; 8 Taunt. 136, s. c. *White v. Bartlett*, 9 Bing. 378. *Coles v. Wright*, 4 Taunt. 198. *Tope v. Hockin*, 7 B. & C. 111. *Whitbread v. Brooksbant*, 1 Cowp. 69.

(*y*) *Townson v. Wilson*, 1 Campb. 396 ; Anon.

398, n. *Clark v. Johnson*, 3 Bing. 424.

(*z*) *Miller v. Aris*, 1 Selw. N. P. 90 (n).

(*a*) *Robson v. Eaton*, 1 T. R. 62 ; *Rogers v. Kelly*, 2 Campb. 122.

(*b*) Per Cur. *Smith v. Sleep*, 12 M. & W. 588. *Wakefield v. Newson*, 6 Ad. & E., n. s., 280. *Ashmole v. Wainwright*, 2 ib. 837.

sums of money on a parish, the bailiff illegally compelled one of the inhabitants, under a threat of distraining his goods, to pay him the whole amount, and the latter having brought an action against him for the extortion, it was held that the fact of the bailiff's having, before the commencement of the action, paid over the entire sum to the sheriff, and the sheriff to the exchequer, constituted no defence to the action. (c)

If a party acts as the agent of an executor de son tort in collecting the assets, and knows at the time that his principal is not the legal personal representative, he is himself liable as executor de son tort, and responsible for the money he has received, although he may have duly accounted with his principal, and paid over to the latter all the money he has collected. He can only discharge himself by paying the amount to the legal personal representative. (d)

If an agent sells goods with a full knowledge that he has no right to sell, and conceals that fact from the buyer, he is liable to the latter in a special action on the case in assumpsit for the deceit, although before action brought he has paid over the price. (e) So if he misleads the plaintiff by giving him to understand that he has *not* paid over the money, and thereby induces the plaintiff to sue him for its recovery, he is then precluded from insisting on the defence of payment over. (f)

If a person receives a deposit of a sum of money in the character of a stakeholder, he is personally liable if he pays over the money before the condition on which it was to become due is performed, except when the money has been illegally deposited in his hands, when he is bound to return it on demand. (g) An auctioneer who has received a deposit on the sale of an estate, holds the money as a mere stakeholder; (h) and it is consequently his duty not to part with the deposit until the sale is completed, and until it appears by the event to whom it properly belongs. (i) If, therefore, he pays over the money, and a defect of title is subsequently discovered, which prevents the purchase, he will be liable in an action for money had and received, although he had no express notice to retain the money in his hands to abide the event. (k)

In the above cases it must be observed, that the party recovering the money from the agent is the person who actually paid it into his hands. The mere circumstance of money having been paid by a prin-

(c) *Snowdon v. Davis*, 1 Taunt. 359. *Lovell v. Simpson*, 3 Esp. 153.

(d) *Sharland v. Mildon*, 10 Jur. 771.

(e) *Peto v. Blades*, 5 Taunt. 657.

(f) *Dampier, J., Edwards v. Hedding*, 5

Taunt. 816.

(g) *Hastelow v. Jackson*, 8 B. & C. 221.

(h) *Burrough v. Skinner*, 5 Burr. 2639.

(i) *Id. Edwards v. Hodding*, 5 Taunt. 815.

(k) *Gray v. Gutteridge*, 1 M. & B. 614.

principal to his agent, with directions to pay it to a third person, imposes no liability upon the agent to such third person, unless there is an express or implied assent on the part of the agent to pay the money according to the directions he has received. The mere receipt of the money by the agent is no evidence of an implied assent to apply it to the purposes for which it was professedly remitted to him. He holds the money for the use of the remitter: the privity of contract is between him and his principal, and not between the agent and such third party, until by some act done, or by some engagement entered into with the person who is the object of the remittance, the agent has consented to appropriate the money to his use.^(l)

Liability of the AGENT to the PRINCIPAL.—If the agent is guilty of any negligence, misconduct, or breach of faith, in the conduct and management of the business entrusted to him by the principal, he of course subjects himself to an action for damages at the suit of the latter.^(m) But the principal cannot convert his own agent into a principal, and sue him as such.⁽ⁿ⁾

(l) *Williams v. Everett*, 14 East, 597.

(m) *Boorman v. Brown*, 3 Ad. & E. n. s. 525.
Raleigh v. Atkinson, 6 M. & W. 670. *Marsden*

v. Newmarch, 10 Jur. 759.

(n) *Whalley v. Davison*, 10 Jur. 573.

CHAPTER XVII.

OF THE CONTRACT OF PRINCIPAL AND SURETY.

SECTION I.—*Contracts of Suretyship, and their attendant liabilities quoad third parties*—Of the nature of the contract, and its authentication in law—Requisites of the written memorandum thereof—Disclosure of the consideration on the face of a simple contract of suretyship—Inadmissibility of oral evidence to supply the consideration—Construction of the contract—Extent and duration of the liability of the surety—Bonds to secure the faithful services of clerks, collectors, &c., in annual and permanent offices and employments—Termination of the employment by the death of the employer—Discharge of the surety—Bonds to secure the fidelity of clerks to firms in partnership, and the repayment of advances—Effect of changes in the firm—Continuing liabilities on bonds—Continuing guarantees—Avoidance of the contract by reason of fraud or concealment between the creditor and the principal—Discharge of the surety by the extinguishment of the primary obligation, or by giving time to the principal.

SECTION II.—*Liability of the Principal to the Surety and of Co-sureties inter se.*—Satisfaction of the principal debt or obligation by the surety—Indemnification of the surety by the principal—Liabilities of co-sureties inter se.—Contribution between them to the common liability.

SECTION I.

OF THE CONTRACT OF SURETYSHIP AND ITS ATTENDANT LIABILITIES AS REGARDS THIRD PARTIES.

Nature of the contract.—The contract, or undertaking of a surety, is a contract by one person to be answerable for the payment of some debt, or the performance of some act, or duty, in case of the failure of another person, who is himself primarily responsible for the payment of such debt, or the performance of the act covenanted, or agreed to be done.

To the contract and engagement of suretyship it is essential that there be a principal or third party primarily liable, for there can be no accessory without a principal; (a) if, therefore, no contract has been entered

(a) L'obligation d'un fidéjusseur n'est autre chose qu'un simple accessoire à l'obligation du débiteur principal, laquelle a pour cause celle de

l'obligation du débiteur principal. *Polhier*, (OBLIGATIONS,) No. 446, 449. *Instit. lib. 3, tit. 21, § 5.*

into with the third party on whose account the covenantor or promisor professes to act as surety, no liability attaches to the latter, as he cannot be made primarily liable upon a contract by which he has expressly imposed upon himself only a secondary liability as surety.

From the terms and language of a contract, a doubt often arises as to whether the contract is the contract of a surety coming in aid only of a principal debtor or contractor, and undertaking a secondary liability upon the default of the principal, or whether it is the contract of a principal and sole contracting party stipulating for some benefit or advantage for a third party, who is not bound by the contract, and on whom no liability whatever attaches. When a man wishing to procure credit for his friend, writes a letter to a shopkeeper, requesting him to supply such friend with goods, saying, "If *he* does not pay you *I* will," the undertaking is the undertaking of a surety. If he says, "'I will be answerable,' or 'I will see you paid,' the expressions are equivocal, and then we ought to look at the surrounding circumstances, to see what the contract really was." (b) If upon examination of those circumstances it should appear that the party to whom the goods have been furnished has been treated as the debtor and principal contracting party, if the credit has been given to him in the tradesman's books, and he has been applied to for payment, then the promisor can only be made liable as a surety in default of such debtor and principal contracting party.

Authentication of the contract.—According to the Roman civil law, the engagement of a surety could only be contracted by STIPULATION. By our own common law it might be contracted orally, but the legislature has thought fit to require the engagement to be authenticated by writing; and it has been enacted, as previously mentioned, by the fourth section of the Statute of Frauds, that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum, or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorized. The written memorandum must disclose either in express terms, or by necessary implication, the consideration or inducement for the making of the promise, as well as the promise itself. (c)

Construction of the contract.—Extent and duration of the liability of

(b) Bayley, B., ante, 100, 101, 147.

Browne, 15 Law, J., n. s. (Q. B.) 23.

(c) Ante, 95, 106—118. *Willington v.*

the surety.—If the surety has bound himself by a penal obligation under seal for the performance of some contract, act, or duty, by his principal, the condition of the obligation is always restrained by the recitals; and where the time for which the surety is to be bound is marked out in the recitals, it cannot afterwards be extended by any general words.(d) If the recital sets forth the appointment of the party, on whose behalf the surety consents to become bound, to some office or employment, and the condition of the bond is for the good conduct and faithful service of the party in such office or employment, the liability of the surety will be coextensive with the duration of the office; if the office is an annual office, the liability will not extend beyond the current year of office; if it is a fixed and permanent employment for the life of such party, the liability of the surety will continue during the whole of the life of the latter; if on the other hand the duration is uncertain, if it is holden at the will of the employer, or *durante bene placito*, the liability will be as indefinite and uncertain as the time of the employment. Moreover, if a bond be given to secure the faithful services of the principal in one office or employment, it will not extend to a different office or employment; and a surety who becomes responsible for the good conduct of his principal as a clerk, will not be bound for him if he is afterwards employed as “a manager.”(e)

In an action upon a bond given by a surety to the post-master-general, to secure the faithful service of a deputy-post master, it appeared by the recitals of the bond, that the post-master-general had deputed Jenkins to be deputy-post-master “for the term of *six months* following,” and the condition was, that Jenkins should, during all the time he continued deputy-post-master, faithfully and diligently perform and execute the duties of the office, and observe all such orders and instructions as the plaintiff, the post-master-general, should from time to time give or send to him; and it was held, that the words of the condition, “*during* all the time that he should continue deputy-post-master,” were cut down and restricted by the words of the recital, which stated, that Jenkins had been appointed “to execute the said office for the term of six months next following;” and as it appeared from the record that the action had been brought against the defendant, the surety, in respect of a defalcation by the deputy after the expiration of the said six months, the court ruled that the plaintiff was not entitled to recover.(f) “And Twysden, J. cited a case between *Horton* and *Day*, where in an obligation it was recited, that

(d) *Ellenborough, C. J., Sansom v. Bell*, 2 Campb. 39.

276.

(f) *Lord Arlington v. Meyricke*, 2 Wms.; Saund. 411, a.

(e) *Anderson v. Thornton*, 3 Ad. & E., n. s.,

a sheriff had appointed the defendant bailiff of a hundred within his county, and the condition of the obligation was, that the defendant should 'duly execute all warrants to him directed;' and it was adjudged that the words 'all warrants' should be intended to be only all warrants which were directed to the defendant as bailiff of the said hundred, and not other warrants.(g) And so here the words, 'during all the time,' shall be intended but only during the said six months recited in the condition." (h)

So again, where the obligation recited the appointment of a collector to collect certain revenues from time to time for twelve months, and the condition was, that he should, from time to time, and at all times thereafter during the continuance of such his employment, use due diligence in collecting and receiving all rents and sums of money which should *annually* grow due, and truly pay and account for the same, it was held, that the obligation was confined to the period of twelve months mentioned in the recital. (i) And although the recital of a bond, setting forth the appointment of the principal to a certain office or employment, does not state the nature or duration of the office, or in any way limit the period of the service, for the honest and faithful performance of which the surety binds himself; yet if the office is in point of fact an annual office, and there is a fresh deputation and appointment each year, the surety is only answerable for the execution of the duty for the current year. The consequence of giving to the condition a more enlarged construction would prolong the responsibility of the surety to an indefinite period, and probably for the whole life of the party for whom he has consented to become bound, whatever may have been the misconduct of the latter; and as there are no means at common law by which the surety can redeem himself from this interminable liability, the courts have wisely narrowed the construction of the condition to the actual term of the office or employment mentioned in the recital. "I do not mean to say," observes Bayley, J., "that a bond conditioned for a longer period would be absolutely void; but merely that there ought to be very strong words to show that clearly to be the intention." "A responsibility beyond the current year," further observes Lord Ellenborough, "would be of so grievous and burdensome a nature to the surety, that it requires to be established by clear and certain words." (k)

(g) See this case reported Al. 10; Sty. 18; and *The African Company v. Mason*, cited 1 Str. 227.

(h) *Lord Arlington v. Meyrick*, 2 Wms.

Saund. 411, a.

(i) *Liverpool Water Works Company v. Atkinson*, 6 East, 512.

(k) 2 B. & Ald. 439; 2 M. & S. 370.

It has accordingly been holden, that where the recital of a bond states that the principal "has been for some time past and still is collector of taxes" for a certain district, and the bond is conditioned for the due payment by him "at all times thereafter" to the receiver-general of taxes, of all sums of money that he should from time to time collect and receive from the inhabitants; and it appears that such collector is appointed for one year, and so on from year to year, his surety upon the bond is only answerable for him during the continuance of the single appointment under which he is acting at the time of the execution of the bond, and cannot be made liable for his defalcations on his appointment in the ensuing year. (*l*)

But if the surety by express words plainly manifests an intention to be bound for the faithful service, and good conduct of the party, not only for the current year of office, but for all succeeding years under any fresh appointment, the obligation will of course continue in force as long as the obligee may think fit to continue the employment. Thus where a bond reciting the appointment of the principal to an office was conditioned for the due fulfilment by him of the duties thereof, "during such time as he shall continue in the said office, whether by virtue of his said appointment, or of any re-appointment thereto," it was holden that the obligation was not confined to the current year of office, but extended to all subsequent years, during which the party was continually reappointed. (*m*) And the surety may, by the terms of an express contract under seal, render himself responsible for past, present, and future receipts and payments, and preceding debts and defaults, as well as those that are to come, provided the intention of the parties to that effect be expressed with a precision not to be mistaken. (*n*) And if the duration of the office or employment to which the party is stated to have been appointed is indefinite and uncertain; if it is holden, or continues, *durante bene placito*, and there is nothing in the language of the recital or of the condition directly or indirectly limiting the period of liability, the extent and duration of the obligation of the surety are then as indefinite and uncertain as the period of employment, and will continue as long as the employment lasts, though it should be for the whole life of the principal or party employed. (*o*)

The civil and continental law enables the surety, when no time at all

(*l*) *Wardens of St. Saviour's v. Bostock*, 2 N. R. (5 B. & P.) 180. *Hassell v. Long*, 2 M. & S. 363. *Peppin v. Cooper*, 2 B. & Ald. 481. *Leadley v. Evans*, 9 Moore, 102. The offices of churchwardens and overseers are annual by statute, and the courts will take judicial notice of

the fact, *ib.* 107; Best, C. J.

(*m*) *Augers v. Keen*, 1 M. & W. 390.

(*n*) *Saunders v. Taylor*, 9 B. & C. 35, 41.

(*o*) *Curling v. Chalklin*, 3 M. & S. 509, 511. *McCahey v. Alston*, 1 M. & W. 386.

is marked out by the contract for the termination of his liability, to release himself by process of law after the lapse of "a considerable period" from the time of the making of the contract. "Although," observes Pothier, "there is no clause in the contract by which the principal debtor has undertaken to discharge the surety from his engagements, yet, after his liability has continued a long time, (diu,) he is entitled to demand a release." Some jurists have fixed the period at three, and some at ten years; but "nothing certain can be laid down in this respect. Each case must depend upon its own particular circumstances, and the period of release must be left to the discretion of the judge." If, on the other hand, the time for which the surety is to remain bound is expressly specified, or appears by necessary intendment from the terms of the contract, then the surety has no means of accelerating the period of release by his own act. "Where the contract between the surety and the principal debtor specifies the time for which the surety is to be bound, the latter cannot, during the term, demand that the principal debtor shall release him from his obligations; for as he knew, or ought to have known, the nature of the contract to which he had acceded, he ought to have been prepared for the continuance of the obligation during the whole of the appointed time. Therefore, the person who has become surety for a trustee for the due execution of his trust cannot demand to be released from his engagement so long as the trust lasts." (p)

In our own law, the surety has no means under any circumstances of citing the other parties to the contract before a legal tribunal to show cause (as it were) why he should not be discharged upon certain terms, and with certain restrictions, from the liability he has voluntarily imposed upon himself, and the courts, therefore, in all cases construe doubtful contracts of suretyship (when they are under SEAL and the surety has no power of revoking them) in favour of the surety so as to narrow rather than enlarge the liability.

Thus, where the condition of a bond was that a clerk should account for and pay over to the obligee, his executors or administrators, all monies, bills, &c., which he should receive in the course of his employment as clerk to the obligee, and the action was brought by the executors of the latter, and the breach assigned was the non-payment of money received by the clerk after the death of the obligee in the course of an employment by the executors, who were carrying on the obligee's business for the benefit of his estate; it was held that the liability of the surety

ceased with the death of the obligee, and could not be extended to the new contract subsequently entered into by the executors with the clerk. (q)

An action having been brought by the plaintiff against the defendant, upon a bond given by the latter as a surety for the honesty of a clerk in the plaintiff's employ, it appeared that the condition of the bond was that the clerk should, during the time he continued in the service of the plaintiff, faithfully account for and pay over all monies which he should receive belonging to the plaintiff into his the plaintiff's hands, and the breach assigned was the non-payment by the clerk of 14*l.* 13*s.*, which he had received on account of the plaintiff *and his partner*, and it was held that the defendant could not be bound beyond the scope of his engagement, which was to be answerable for the fidelity of the clerk to the plaintiff only; that the condition was confined expressly to the plaintiff, whilst the breach assigned was for non-payment of money to the plaintiff and *his partner*, which breach was not within the condition, and judgment therefore was given for the defendant. (r)

Bonds and guarantees to firms in partnership.—If a bond be given to secure the faithful services of a clerk to a firm in partnership, or the repayment of advances to the firm, and any change takes place in the constitution of the co-partnership, either by the death or retirement of the existing partners, or the accession of new partners to the firm, the contract of suretyship is at an end, unless it plainly appears from the terms and language of the contract to have been the intention of the contracting parties that the security should be a continuing security, and should remain in force throughout all changes in the co-partnership. (s)

A bond was given by a surety to the several partners of a banking house *nominatim* to secure the repayment to them "or *either* of them" of advances to be made "by them" from time to time to one Benjamin Blyth. Walwyn, one of the partners and obligees, died, and the surviving partners brought an action against the surety in respect of monies advanced by them to Blyth after the death of Walwyn; but the court held that the contract was determined by the death of the latter, and that the liability of the surety could not be extended so as to cover and protect the subsequent advances. "The court will, no doubt," observes Lord Ellenborough, "construe the words of the obligation according to the

(q) *Barker v. Parker*, 1 T. R. 287, 295.
 (r) *Wright v. Russel*, 3 Wils. 530; 2 Bl. rep. 934, s. c. *Lord Arlington v. Merricke*, 2 Wms. Saund. 414.
 (s) Ante, p. 280, 287. *Chapman v. Beckington*, 3 Ad. & E. N. s., 703; 3 G. & D. 33, s. c. *Bellairs v. Ebsworth*, 3 Campb. 52.

intent of the parties to be collected from them, but the question is what that intent was? The defendant's obligation is to pay all sums due to *them* on account of their advances to Blyth. Now who are *them* but the persons before named, amongst whom is James Walwyn, who then constituted the banking-house, and with whom the defendant contracted. The words will admit of no other meaning. And indeed with respect to any intent which parties entering into contracts of this nature may be supposed to have, it may make a very material difference in the view of the obligor as to the persons constituting the house at the time of his entering into the obligation, and by whom the advances are to be made to the party for whom he is surety; for a man may very well agree to make good such advances, knowing that one of the partners on whose prudence he relies will not advance money imprudently. The character, therefore, of the several partners may form a material ingredient in the judgment of the obligor when entering into the engagement of suretyship." (t)

This principle of construction, narrowing the liability of the surety, applies with still greater force in the case of bonds conditioned for the repayment of advances to be made to a firm in partnership. A surety may consent to be responsible for the joint debts of a father and son in partnership, relying on the property and intelligence or character and integrity of the father, but may not be willing, and may never have intended to remain responsible for the debts of the son alone after the death or retirement of the father; if, therefore, such an intention exists on the part of the surety, it must expressly appear upon the face of the instrument.

Thus, where an action was brought upon a joint and several bond, whereby John and Thomas Cooke as principals, (described as "bankers at Sunderland, carrying on business under the firm of Cooke and Co.,") and the defendant as surety, became bound to the plaintiffs for the repayment of advances, to be made by them to the said John and Thomas Cooke, "or *either* of them," and Thomas Cooke died, and after his death advances were made to John Cooke, the survivor; it was held that the liability of the defendant as surety extended only to the advances made "to *either* of" the Cookes during their joint lives, and during the continuance of their partnership as bankers. "In order to carry the bond further, or extend its terms as against the surety," observes Gifford, C. J., "it ought most expressly to appear upon the face of the instrument that

(t) *Strange v. Lee*, 3 East, 489. *Weston v. Burton*, 4 Taunt. 673. *Bodenham v. Purchas*. 2 B. & Ald. 39.

he intended to render himself accountable for advances made to the survivor. Without the introduction of language clearly importing this extended liability, I think that the words or "either of them" must be confined to the acts of either of the Cookes during the existence of the co-partnership, and could have no effect after that period." (u)

So if the liability of the surety is intended to continue after the retirement as well as the death of one of several persons in partnership, such intention must be manifested with a precision not to be mistaken.

A bond entered into by Robert Baldwin, Richard Cradock, and William Joy, as principals, and by the defendant, as surety, recited that Baldwin, Cradock, and Joy had been appointed by the obligees, their agents, for the sale of books printed by them, and the condition was that Baldwin, Cradock, and Joy, "and the survivors and survivor of them, and such other person or persons as should or might, at any other time or times thereafter, in partnership with them or any or either of them," act as agent for the obligees for the sale of books as aforesaid, truly account to the obligees for all books received by them, &c., &c. About six years after the execution of this bond Joy retired, and after his retirement, books were received by the continuing partners which were not truly accounted for, and an action was consequently brought against the surety upon the bond in respect of such default by the principals; but it was held, that by the retirement of Joy from the partnership, the surety was discharged from all further liability, inasmuch as the words of the obligation only provided for two contingencies,—the death of a partner, and the introduction of a new partner,—and did not meet the case of the retirement of one of them, which was a contingency substantially different from the other two. If the bond had been conditioned for the performance of the engagement by Baldwin, Cradock, and Joy, "or any or either of them, or the survivors or survivor, of any, or either of them, that," it was observed, "would have met the case of one or more of these persons quitting the partnership, and have had the effect of continuing the liability after their withdrawal." (x)

The same rule and principle of interpretation prevails in the case of guarantees by simple contract. If a man undertakes by a simple note of hand to be responsible for the repayment of money advanced, or the payment of goods supplied to the firm, and one of the partners dies, or

(u) *Simson v. Cooke*, 8 Moore, 605; 1 Bing. 452, s. c.

(x) *University of Cambridge v. Baldwin*, 5 M. & W. 580, 586. See further as to the con-

struction of bonds, *Ingleby v. Swift*, 10 Bing. 84, 3 M. & Sc. 488. *Webb v. James*, 7 M. & W. 279. *Vesey v. Mantell*, 9 M. & W. 323.

retires, or new partners are added to the firm, the guarantee ceases, unless the intention of the parties, that the liability should continue, notwithstanding changes in the firm, is plainly expressed upon the face of the written document. (y)

A surety who guarantees the payment of a promissory note or bill of exchange, if it be not paid at maturity, is not entitled to notice of dishonour, as he is no party to the instrument. He is liable, whenever called upon, as soon as the day of payment has passed, unless discharged by the laches and misconduct of the creditor in giving time for payment to the principal. (z)

In all cases of suretyship by simple contract, the benefit or service rendered to, or the trust and confidence reposed in, the principal debtor by the creditor, constitute the consideration and foundation in law for the undertaking and promise of the surety. (a)

BONDS to secure LIMITED ADVANCES.

Loans to firms in partnership.—If a bond is given by a surety to secure the repayment of loans and advances of money to the principal, provided such advances do not exceed in the whole at any one time a certain limited amount, the proviso protects the surety from being answerable beyond the amount named, but does not render the obligation void if the advances go beyond it. The natural construction is, not that the obliges shall forfeit the benefit of the obligation if his advances exceed the prescribed limits, but that the liability of the surety, whatever the advances may happen to be, shall not be carried beyond the sum named. If the parties intend to restrict the amount of the loan as well as the liability of the surety, and to attach a consequence so penal as the forfeiture of the bond to advances beyond a limited amount, they must do so with a clearness and precision not to be mistaken.

A bond given by a surety to secure the repayment of monies advanced, recited that the obligees carried on the business of bankers, and the principals that of paper manufacturers; that the latter kept an account with the obligees as their bankers, which they had overdrawn to a certain amount, and in order to enable them to go on with their business they had applied to the obligees to allow them to overdraw at any time such further sums as they should require, so that these further sums, together with the amount overdrawn, should not exceed at any one time 5,000*l.*, and the condition

(y) *Myers v. Edge*, 7 T. R. 254, 256. *Dry* *Hitchcock v. Humphrey*, 6 Sc. N. R. 553.
v. *Davy*, 10 Ad. & Ed. 30.

(a) *Ante*, 35. *Sison v. Kidman*, 4 Sc. N. R. 429.

(z) *Walton v. Mascal*, 13 M. & W. 72.

was that the principal or surety should pay the sum then owing and such further sums as the obligees should thereafter advance to the principals not exceeding in the whole 5,000*l.* The bankers having advanced more than 5,000*l.* it was contended that they had thereby vacated the obligation, but the court held that the language of the contract did not amount to a prohibition of further advances, but to a qualification only of the liability of the surety. "Had the surety," observes Lord Ellenborough, "intended to impose a condition on his part that the bankers should not advance beyond 5,000*l.*, in order to make sure that the principals, the manufacturers, should not by an indefinite supply of funds be led into a more extensive course of dealing than he contemplated, it would have been easy to have provided for such a condition by stipulating that the obligation should be void if any further advance were made. But we do not find any such provision."(*b*)

Continuing LIABILITIES.—In the case of bonds given to secure advances of money, or supplies of goods to a certain amount, a doubt sometimes arises, as to whether the contract was intended to embrace only a particular dealing to that amount, or to remain as a standing or continuing security to the extent of the sum named to cover and protect indefinite supplies and advances as long as the parties might choose to deal together. A bond given by the defendant as a surety to secure the repayment of a loan, recited that the principal had opened an account with the plaintiffs, the obligees of the bond, as his bankers, and that the plaintiffs had agreed to discount bills of exchange, and otherwise pay, lend, and advance to the principal "any sum or sums of money not exceeding at any one or more time or times the sum of 200*l.* in the whole," and the bond was conditioned for the payment by the principal, and by the defendant as surety, of "all and every such sum and sums of money not exceeding the sum of 200*l.* as aforesaid," as the plaintiffs or any future partner of the firm should advance or pay on account of the principal, and it was held that this bond was a continuing or standing security not confined to the first 200*l.* advanced, but to all future advances and payments that might at any time be made by the principal to the banking house.(*c*)

The courts, however, in the case of contracts of suretyship under seal, when the intention of the parties as to the duration of the liability appears upon the face of the contract to be doubtful and uncertain, lean in favour of a construction which will limit the liability of the surety to some

(*b*) *Parker v. Wise*, 6 M. & S. 246. *Jones v. Clarke*, 3 Ad. & E., n. s., 194.

(*c*) *Batson v. Spearman*, 9 Ad. & E., 298.

particular supply or advance, and confine it with an ascertained definite limit, rather than extend it to a general and continuous supply, so as to create an indefinite liability, from which the surety might have no means of relieving himself during the whole life of the principal.

A bond given by the defendant as surety for one Coburn recited that Coburn having occasion for divers sums of money not exceeding on the whole the sum of 3,000*l.* to enable him to carry on his business, had applied to the plaintiffs to advance the same at such times and in such proportions as he might require, and the bond was conditioned for the payment unto the plaintiffs of all such sums of money not exceeding the sum of 3,000*l.* with interest as should at any time thereafter be advanced by the plaintiffs to Coburn. Divers sums of money were accordingly advanced from time to time and payments were made in return, and the liability of the surety was sought to be extended to the balance found to be due on the account current, but it was held that the bond was a security only for the first sums advanced to the extent of 3,000*l.* "This is a bond," observes Lord Ellenborough, "given by the surety as an indemnity for advances to a definite amount; it is the same as if the surety had expressed that the bankers might lend to the amount of 3,000*l.*, and when an advance was made to that amount the guarantee became *functus officio* and was not a continuing guarantee."(*d*) If, therefore, in such a case 3000*l.* has been advanced and 3,000*l.* has been received, or paid back on account of such advances, the liability of the surety is extinguished.

Continuing GUARANTEES.—But in the case of simple contracts the courts seem to favour the more extended and continued liability. Thus, where the defendant gave to the plaintiff a guarantee for the payment of "any goods he hath or may supply W. P. to the amount of 100*l.*," it was held that the guarantee was a continuing or standing guarantee, not confined to the first hundred pounds worth of goods furnished, but to all future supplies of goods at any time afterwards furnished so long as the parties continued to deal together.(*e*) So where the guarantee was "In consideration of your supplying my nephew with earthenware and china I hereby guarantee the payment of any bills you may draw upon him on account thereof to the amount of 200*l.*" it was held a continuing guarantee remaining as a standing security to the amount specified, so long as the supply of earthenware lasted, and it was observed by Alderson B., that "where the

(*d*) *Kirby v. Duke of Marlborough*, 2 M. & S., 22.

(*e*) *Mason v. Pritchard*, 12 East, 227.

words of the instrument will bear the construction of a continuing guarantee they will be construed most strongly against the maker.”(f)

From a continued liability under seal the surety has, as previously mentioned, no means of escape at common law: he cannot recall the bond, covenant, or obligation, that he has entered into, and say that he will be no longer responsible for advances or supplies to the principal unless in the contract of suretyship he has expressly reserved to himself such a power,(g) and his liability may be prolonged indefinitely, and for the whole life of the principal, however reckless and extravagant the latter may have become; but, in the case of simple contracts, the surety (though of course liable for all advances and supplies that have been made on the faith of his promise and undertaking) may at any time revoke such promise, and discharge himself from the future and continuing liability by giving notice to that effect, and one naturally comes therefore more readily to the conclusion that a continuing liability was contemplated by the parties when the undertaking is by simple contract, and the surety can so readily free himself from the continued liability by notice,(h) than when it is by deed and he is precluded from so doing.

The language of the following guarantees has been held clearly to import a continuing liability.

“I consider myself bound for *any* debt A. B. may contract with you in his business not to exceed 100*l.*”(i)

“I hereby undertake to be answerable to the extent of 100*l.*, for *any* tallow supplied by you to A. B.”(k)

“I hereby agree to guarantee the payment of goods to be delivered in umbrellas to S. & Co. according to the custom of their trading with you in the sum of 200*l.*”(l)

“As an inducement to you to sell W. C. goods and continue your dealings with him, I hereby agree and undertake to guarantee you in a sum of 100*l.* payable to you in default on the part of the said W. C. for two months.”(m)

“In consideration of your agreeing to supply goods to K. we agree to guarantee any future debt with you to the amount of 600*l.*”(n)

The following guarantees have, on the other hand, been held to limit the

(f) *Mayer v. Isaac*, 6 M. & W. 612; 12 East, 228. *Hitchcock v. Humphrey*, 6 Sc. N. R. 549.

(g) *Hassel v. Long*, 2 M. & S. 370. *Calvert v. Gordon*, 1 M. & R. 497; 3 M. & R. 124; 2 Sim. 253. *Hough v. Warr*, 1 C. & P. 151.

(h) 12 East, 227.

(i) *Merle v. Wells*, 2 Campb. 413.

(k) *Bastow v. Bennett*, 3 Campb. 220.

(l) *Hargreave v. Smee*, 3 M. & P. 573; 6 Bing. 244, s. c.

(m) *Allan v. Kenning*, 2 M. & Sc. 768; 9 Bing. 618, s. c.

(n) *Martin v. Wright*, 9 Jur. 178.

liability of the surety to one solitary transaction, or to a particular course of dealing to a certain amount, and to be discharged or extinguished as soon as supplies or advances to the amount named have been made and paid for, or satisfied by the principal.

"I engage to guarantee the payment of Mr. A. M. to the extent of 60*l.* at quarterly account, bill two months, for goods to be purchased by him of you."(*o*)

"I hereby agree to be answerable to K. for the amount of five sacks of flour to be delivered to W. P., payable in one month."(*p*)

"I hereby agree to be answerable for the payment of 50*l.* for T. L. in case he does not pay for the gin he receives from you."(*q*)

AVOIDANCE of the Contract by reason of FRAUD.

If there has been any fraud, misrepresentation, or concealment on the part of the principal debtor, to induce the surety to enter into the obligation, and the plaintiff has in any way been a party or privy to this fraud, the contract is void ab initio, and the surety cannot of course be sued upon it. (*r*) "If with the knowledge, or assent of the creditor, any material part of the transaction between the creditor and his debtor, be misrepresented to the surety, the misrepresentation being such, that but for the same having taken place, either the suretyship would not have been entered into at all, or being entered into, the extent of the surety's liability might be thereby increased, the security so given is void at law on the ground of fraud."(*s*) "When any friend advances money to relieve another person from the pressure of his necessities, and the parties interested enter into a private agreement, over and beyond that with which the friend is acquainted, such agreement is void in law as being a fraud on such friend." Therefore, where a widow, in straitened circumstances, took a house upon the terms that she was to take the furniture of the preceding tenant, at a valuation, provided she could raise the money within a given time, and a third party came forward upon the understanding that the price to be paid by her for the furniture had been settled at 70*l.*, and became responsible for the payment of that amount, but it afterwards appeared that there had been a secret understanding between the widow and the parties, that the real price was to be 100*l.*, and that the widow had given two promissory notes to secure the payment of the additional

(*o*) *Melville v. Hayden*, 3 B. & Ald. 593.

(*p*) *King v. Groves*, 6 Bing. 276.

(*q*) *Nicholson v. Payet*, 1 C. & M. 48; 1 Tyr.

(*r*) *Spencer v. Handley*, 5 Sc. N. R. 546.

(*s*) *Tindal, C. J., Stone v. Compton*, 5 Bing.

N. C. 142; 6 Sc. 846, s. c.

164, s. c.

30*l.*, the existence of which, as well as of the underhand agreement, had been kept back from the third party; it was held that the transaction was a gross fraud upon the latter. "The plaintiff," observes Buller, J., "wanted to get 100*l.* for the goods, and the scheme was that the goods should be apparently sold for 70*l.*, and the residue of the purchase money paid under a private agreement unknown to *Welch*, (the third party); now that was a gross fraud on him to induce him to advance his money, and as this fraud was practised by the plaintiff he cannot recover."(*t*)

So where a surety had given a guarantee to the creditor to secure payment of iron of the value of 200*l.*, to be supplied to the principal debtor, and it appeared that there had been a private agreement between the creditor, and the said principal debtor, to the effect that the latter should pay 10*s.* per ton beyond the market price, to be applied in liquidation of an old standing debt due to the former, and it was held that this agreement was a fraud upon the surety, which discharged him from liability upon his contract. "I think," observes Abbott, C. J., "that in every transaction like the present, a condition is virtually incorporated that the person who is to give the guarantee shall be truly informed of the bargain really made by the vendor of the goods with the buyer. Now, if it be part of the bargain that anything extra shall be invoiced with, or tacked to, the market price of the goods which is not communicated to the surety, I think the withholding of that circumstance discharges the surety." "There is no doubt," further observes Bayley, J., "that it is the duty of a creditor taking a guarantee to put the surety in possession of the real bargain between him and the principal; and if he neglects so to do it is at his own peril. . . . The secret understanding between the creditor and the principal, with reference to the old debt, was a fraud upon the surety and makes the contract void."(*u*)

Of the EXTINGUISHMENT of the CONTRACT OF SURETYSHIP and the DISCHARGE of the SURETY.

Release of the principal obligation.—If a debt secured by the collateral undertaking of a surety be released or satisfied, the engagement of the surety is at end, the extinguishment of the principal obligation necessarily involving in it the discharge of the surety. (*Reo liberato liberantur fidejussores.*)(*x*) If, therefore, a creditor compounds with his debtor without

(*t*) *Jackson v. Duchaire*, 3 T. R. 552.

(*u*) *Pidcock v. Bishop*, 5 D. & R. 509, 511;
3 B. & C. 605, s. c.; *Lewis v. Jones*, 6 D. & R.
569; 4 B. & C. 513, s. c.; 515 n.

(*x*) *Lewis v. Jones*, 4 B. & C. 506, 512;

Whitcher v. Hall, 5 B. & C. 276 277; Pothier,
No. 449. Cum causa principalis non consistit,
ne ea quidem quæ sequuntur locum habent;
Dig. lib. 14. tit. 3.

the assent of the surety, and precludes himself from suing upon the original obligation for the original debt, the surety is discharged.^(y) So if a new contract is substituted in the place of the original contract, or if the original contract is altered in any material point so as to constitute a new agreement, varying substantially from the former, the surety is no longer bound.^(z) "The surety," observes Pothier, "is discharged by novation of the debt, (ante, 312—317,) for he can no longer be bound for the first debt for which he was a surety, since it no longer subsists, having been extinguished by the novation; neither can he be bound for the new debt, into which the first has been converted, since this new debt is not the debt for which he became bound."^(a)

If a man becomes surety for the payment of a debt, secured by the bond of the debtor payable at a given day, and the creditor by an indorsement on the bond under seal, extends the time of payment, this is a material variation amounting to the substitution of a new engagement, in the place of the original contract. The surety is not a surety for the performance of the new engagement, but for the fulfilment of the first contract, with the more limited credit, and that contract being extinguished and the original liability gone by reason of the alteration of the security, the surety is forthwith discharged.^(b)

Any enlargement of the time of payment by a binding contract which ties up the hands of the creditor, and prevents him from suing the principal debtor upon the original obligation, discharges the surety, inasmuch as the situation of the surety is varied and his liability prolonged beyond what was originally contemplated.^(c) But mere laches, or forbearance, or an omission on the part of the creditor, promisee, or obligee, to press the debtor or party liable, and sue him for the money as soon as it becomes due, without any suspension of the usual remedies, will not discharge the surety, unless it is provided by the contract that the creditor shall proceed without delay, and do his utmost to obtain the money.^(d) Nor will a parol agreement to enlarge the time of payment discharge the surety when

(y) *Orme v. Young*, Holt, N. P. C. 84.; *Ex parte Glendinning*, Buck 517.

(z) *Whitcher v. Hall*, 5 B. & C. 277; *Barks v. Parker*, 1 T. R. 290, 295.

(a) Pothier, (OBLIGATIONS,) No. 378. So by the civil law Novatione legitime perfectâ in aliam speciem translata, prioris contractus fidejussores vel mandatores liberatos esse non ambigitur, si modo in sequenti se non obligaverint. Cod. lib. 8, tit. 41, lex. 4.

(b) *Rees v. Berrington*, 2 Ves. 542; *Whitcher v. Hall*, 5 B. & C. 277.

(c) *Combe v. Woolf*, 8 Bing. 162, 1 M. & Sc. 241, s. c.; *Eyre v. Bartrop*, 3 Mad. 221; *Nisbet v. Smith*, 2 Br. C. C. 578; *Rees v. Berrington*, 2 Ves. jun. 539 a; *Ex parte Smith*, 3 Br. C. C. 1; *Law v. E. I. Company*, 4 Ves. 824.

(d) *Musket v. Rogers*, 5 Bing, N. C. 728, 8 Sc. 51, s. c.; *Holl v. Hadley*, 2 Ad. & E. 758; *Orme v. Young*, Holt 84.; *London Ass. Comp. v.*

the principal obligation is under seal, inasmuch as such parol agreement cannot in any way alter or affect the legal operation of the deed, or restrict or suspend the right of action thereon; neither will the acceptance by the creditor of a collateral security from the principal debtor operate as a discharge of the surety, if the position of the latter has in nowise been altered or varied thereby;(e) nor will the surety be discharged if he himself has agreed or assented to the indulgence given to the principal, or has expressly consented and agreed to remain liable after the discharge of the latter.(f)

In the French law, and also in the civil law, an enlargement of the time given to the principal creditor for payment does *not* discharge the principal. "When," observes Pothier, "the creditor, after the contract has been entered into, accords, through liberality, a certain term of payment to his debtor, he cannot lawfully exclude the sureties from a participation in the benefit of such term; for as the agreement has the effect of qualifying the liability upon the principal obligation, and extending the term of payment, the obligation of the sureties necessarily receives the same modification; and they have the same term of payment as the principal debtor, it being the essence of the contract of suretyship, that the surety should not be obliged to more than the principal."(g)

There is greater reason for the continuance of the liability of the surety in the foreign law, notwithstanding the extension of the time of payment to the principal debtor, inasmuch as the surety has the power of securing himself from loss by issuing an attachment on the goods of the principal debtor in case of the apprehended insolvency of the latter.

SECTION II.

INDEMNIFICATION OF THE SURETY—LIABILITY OF THE PRINCIPAL AND OF CO-SURETIES INTER SE.

Liability of the PRINCIPAL.—When the engagement of the surety with the creditor is made with the knowledge and consent of the principal deb-

Buckle, 4 Moore, 153; *Goring v. Edmonds*, 6 Bing. 94.

(e) *Twopenny v. Young*, 3 B. & C. 210; *Bell v. Banks*, 3 Sc. N. B. 503.

(f) *Smith v. Winter*, 4 M. & W. 454; *Cow-*

per v. Smith, 4 ib. 519; *Harden v. Clifton*, 1 Ad. & E., n. s. 522; *Boulbee v. Stubbs*, 18 Ves. 26.

(g) Pothier, (OBLIGATIONS,) No. 381.

tor, there is in point of law an implied request from the latter to the surety to intervene on his, the principal's behalf; and if the principal makes default in payment of the debt, or the performance of the contract, at the time appointed, or as soon as his liability arises, there is an implied mandate, or authority, from the principal to the surety to pay the debt or satisfy and discharge the claim that has arisen, and money paid by the surety for that purpose is money paid for the use of the principal at his request, and the surety may maintain an action against the principal, as previously mentioned, to reimburse himself the amount so paid. (h)

The moment the principal makes default, the surety may step in and discharge the liability, and have recourse to the principal for reimbursement. He need not wait for the commencement of an action, or the issue of legal process, (ante, 230,) but he cannot, of course, accelerate the liability of the principal, and if he pays money voluntarily before the time of payment arrives, or after the principal obligation has been discharged when he was not under any legal obligation to pay, he has no ground of action against the principal.

So by the French law, "whether the surety has paid in consequence of a judgment of a court of law, or voluntarily and without legal process, is a matter of no moment, for in either case, *utiliter debitoris negotium gerit*; he has procured his discharge from the debt, and ought consequently to be reimbursed what it cost him to do so. But, if he has paid before the time of payment has elapsed, he cannot have recourse against the principal debtor until afterwards, for he ought not by his own act to deprive the latter of the term of indulgence which he has a right to enjoy. (i)

The surety may, by express contract with the principal debtor, obtain a right to sue the latter before he has himself paid or satisfied the principal obligation. If the principal, for example, covenants with the surety that he will pay the creditor the debt by a day named, and makes default, the surety may sue him for the amount although he has not himself at the time he brings the action paid any portion of the debt. (k)

By the law of France, and by the civil law, the surety is under no necessity for securing to himself this right by express contract, for whenever the principal debtor falls into embarrassed circumstances, and is threatened with insolvency, that law accords to the surety a right to attach the goods and chattels of the principal debtor, and so provide himself with funds beforehand to answer the engagement he has entered into on his behalf. (l)

(A) Ante, 210, 227, 228, 230. *Se quid autem fidejussor pro reo solverit, ejus recuperandi causa habet cum eo mandati judicium.* Instit. lib. 3, tit. 21, § 6.

(C) Pothier, (OBLIGATIONS,) No. 431, 439;

Dig. lib. 17. tit. 1, lex. 22.

(E) *Loosemore v. Radford*, 9 M. & W. 657.

(F) Pothier, (OBLIGATIONS,) No. 442. Cod. lib. 4, tit. 35, lex 10.

If the surety has bound himself for the payment of a debt due from several joint debtors, and has been compelled to pay money on their joint account, they are jointly responsible to him for the repayment of the amount.(m)

Of the LIABILITIES of Co-SURETIES inter se.

Contribution between co-sureties.—It has previously been stated that if several persons together become surety for one principal in respect of the same debt and transaction, either jointly or severally, or by the same or different contracts, and one of such co-sureties, after the liability of the principal has arisen, pays the debt, or satisfies the whole debt, or claim, or more than his own proportion of it, he may have recourse to his co-sureties for contribution, and recover from them their several proportions of the common liability in an action for money paid by him for their use.(n) Thus, where the plaintiff and defendant, together with the principal debtor, signed a joint and several promissory note, payable two months after date, as sureties for such principal debtor, and the latter paid only a portion of the amount of the note on its becoming due, and the plaintiff then paid the residue, although no demand had been made upon him by the creditor for payment, and subsequently brought his action against the defendant, his co-surety, for contribution; it was held that he was entitled to recover a moiety of the amount he had paid. "All the parties," observed Parke, B., "were jointly and severally liable to the holders of the note, and as all were liable, one party who has paid the note, may bring an action against his co surety for contribution without showing that he had paid it by compulsion."(o)

The principle of contribution amongst sureties is admitted by the law of France, as well as by our own law. It has been established by the French jurists, observes Pothier, upon a principle of equity, which does not permit the co-sureties, who were all equally liable to the payment, and have all been equally benefited by the discharge of the principal obligation, to profit at the expense of him by whom the payment has been made, and who has acted for the benefit of his co-sureties at the same time that he was acting for the benefit of himself.(p)

(m) Post, ch. 29.; Pothier, (OBLIGATIONS,) No. 440.

(n) Ante, 210, 227; *Kemp v. Finden*, 12 M. & W. 421; *Ex parte Gifford*, 6 Ves. 807.

(o) Parke, B., *Pitt v. Purvisford*, 8 M. & W. 539; *Sison v. Kidman*, 4 Sc. N. B. 429.

(p) Ayant quant à l'effet géré l'affaire de ses

cofidèjuseurs, en même temps qu'il faisait la sienne, les ayant par la paiement qu'il a fait libérés d'une dette qui leur était commune avec lui, l'équité exige qu'ils portent leur part de ce paiement, dont ils ont profité autant que lui." Pothier, (OBLIGATIONS,) No. 445, *Argentière*, 213, art. 194.

The civil law, on the other hand, does not admit the principle of contribution between co-sureties,^(q) but enables each of them, before action brought, to protect himself from being sued for more than his own share. The rule on this point is thus expounded in the third book of the Institutes: "Where there are several sureties, they are each, whatever may be their number, bound in solidum, and the creditor is at liberty to demand the whole debt from any one of them. But, by a decree of the Emperor Hadrian, the creditor may be obliged to sue each surety who is solvent at the time he commences his action for the share of such surety *pro rata*; and if any of the sureties are insolvent the burthen then falls upon the rest. But if the creditor shall have sued for, and recovered his whole demand from one of the sureties alone, the whole loss shall fall upon such surety, if the principal is insolvent; and he has no one to blame for this loss but himself, since he might have availed himself of the Emperor Hadrian's decree, and have prayed that the action should not be permitted to be brought against him for more than his individual share of the debt."^(r)

(q) *Solius rei principalis, non alter alterius negotium gerit.* Dig. lib. 46., tit. 1. lex 39.

(r) *Instit. lib. 3, tit. 21, § 4. Dig. lib. 46, tit. 1. Cod. lib. 8, tit. 41.*

CHAPTER XVIII.

CONTRACTS OF PARTNERSHIP—LIABILITIES RESULTING FROM ACTUAL AND REPUTED PARTNERSHIPS.

SECTION I.—*Contracts of partnership as between the parties to such contracts.*—Of the nature and creation of a partnership—Participation in profit and loss creating a Partnership—Participation in profits not making the participator a partner—Payments of wages out of profits—Payments of annuities and the interest of money out of profits—Communities of interest not constituting partnerships—Joint contracts and transactions not making the parties thereto partners—Joint purchasers of goods not being partners—Conditional agreements to contribute capital and divide profits not constituting present partnerships—Of a partnership in profits but not in the joint stock—Inability of one of the partners to introduce a stranger into the firm without the consent of all the rest.

SECTION II.—*Liabilities of partners inter se.*—Of the common law maxim that one partner cannot maintain an action against the firm upon partnership contracts—Liabilities of partners *inter se* upon contracts made by them individually—Covenants and agreements between partners to contribute capital or labour to the joint stock, and not to trade on their own account—Contracts for the payment of services rendered, or goods supplied, or for the repayment of money advanced by one partner to the co-partnership—Of the inability of one or more of several partners to compel a distribution of the profits during the continuance of the co-partnership—Covenants and agreements to account and divide profits—Distinction between continuing trading partnerships and partnerships in particular adventures—Of the right of action of one partner for the admitted balance of a partnership account—Contribution between partners in respect of particular transactions not connected with the general account of profit and loss—Of the dissolution of a partnership—Partnerships at will—Partnerships for terms of years.

SECTION III.—*Partnerships as regards the PUBLIC and THIRD PARTIES.*—Liabilities of partners to third parties upon contracts under seal—Of the inability of one partner to bind his co-partners by deed except by virtue of a special authority under seal—Liabilities of actual and nominal partners upon simple contracts—Of the nature and extent of the implied power of one partner to bind his co-partners by simple contract—Agreements, bills of exchange, and promissory notes, and guarantees made by one partner on behalf of the co-partnership—When the contract is the joint contract of the firm, and when it is the individual contract of the partner making it—Liability of the co-partnership in respect of goods sold, or money advanced to one of the partners on account of the firm—Liabilities of dormant and secret partners—Of the distinction between a sub-contractor and sub-purchaser and a secret partner—Liabilities of nominal partners—Of the extent and duration of the general liability—Dissolution of the partnership—Notification of such dissolution to the public, and third parties.

SECTION I.

CONTRACTS OF PARTNERSHIP AS BETWEEN THE PARTIES TO SUCH
CONTRACTS.

Of the nature and creation of a contract of partnership.—The contract of partnership with its attendant obligations and responsibilities may be considered *first* as it effects the partners themselves *inter se*, and *secondly* as it affects their situation and position as regards the public. Any number of persons may constitute themselves partners by associating together and contributing in equal or unequal proportions money, labour, skill, care, attendance, or services, in the accomplishment of a common object, or the furtherance of a joint undertaking, upon the express or implied understanding that they are to share amongst themselves in certain proportions the profit and loss of the transaction. (a) The contract is founded on, and perfected and made binding by, the consent of the parties, and may be created and established by their acts and deeds, and their common participation in the profit and loss of a trade or business, or of a particular speculation or adventure, as well as through the medium of an express contract of copartnership. If there be no communion of profit, or of loss, there is no contract of partnership as between the partners themselves, whatever may be their apparent situation and position as regards the public.

If one man joins another in the furtherance of a particular undertaking and contributes work and labour, services and skill, towards the attainment of the common object, upon the understanding that the remuneration is to depend upon the realization of profits, so that if the business is a losing business he is to get nothing, he stands in the position of a partner in the undertaking, and not in that of a labourer or servant for hire. Thus where an agreement was entered into between the plaintiff and the defendant, whereby the plaintiff agreed to convey, by horse and cart, the mail from Northampton to Brackley and back again, and the defendant agreed to pay to the plaintiff the sum of 9*l.* per mile per annum (rateable) at the expiration of each quarter of a year, and the plaintiff further agreed to pay to the defendant for one cart then in use the sum of 18*l.*, and also to pay in a fair proportion with

(a) *Contractus societatis est, quo duo pluresve inter se pecuniam, res, aut operas conferunt, eo*

fine, ut quod inde redit lucri inter singulos pro rata dividatur. Puff. Lex Nat., l. 5, ch. 8, s. 1.

the defendant all the repairs or replacing of carts so long as that agreement should be in force: and it was further agreed that the monies received for the conveyance of packages and parcels should be fairly and equally divided between the two parties, each bearing an equal portion of the loss, if any, occasioned by the loss or damage of any such packages, &c., it was held that this agreement constituted and created a partnership between the parties thereto, as carriers, inasmuch as the payment to the plaintiff of 9*l.* per mile per annum was to be subject to the general account of profit and loss of the whole concern.(b)

Two ship agents at different ports entered into an agreement to share in certain proportions the profits of their respective commissions, and the discounts on tradesmen's bills employed by them in repairing the ships consigned to them, &c., and they were held liable as partners to all persons with whom either contracted as such agent, although the agreement expressly provided that neither should be answerable for the acts and losses of the other.(c) So where two houses in trade, the one established in London, and the other abroad, were in the habit of recommending consignments of goods to each other for sale and dividing the commission on all sales of goods effected by the one house on the recommendation of the other, it was held that they were partners with regard to the vendors and owners of such goods although they were not partners *inter se*.(d)

PARTICIPATIONS in the PROFITS of a business or adventure NOT making the participator a PARTNER..

Payments of the wages of labour out of profits.—But a person who merely receives out of the profits, the wages of labour as a hired servant, such as a foreman, clerk, or manager, and who has no interest or property in the capital stock of the business, is not a partner in the concern although his wages may be calculated according to a fluctuating standard, and may rise and fall with the accruing profits. Thus the captain of a vessel who has no interest in the ship or cargo is not a partner with the joint adventurers in the profit and loss of the voyage, although his wages are proportioned to the amount of profit realized.(e)

The owner of a colliery employed a man as captain of one of his barges to carry out and sell coal, and allowed him, as a remuneration for his services, two-thirds of the price for which he sold the coals, after deducting the

(b) *Green v. Beesley*, 2 Sc. 169; 2 Bing. n. s. 108, n. c.
(c) *Waugh v. Carver*, 2 H. Bl. 235; 1 Smith's leadg. cas.

(d) *Cheap v. Cramond*, 4 B. & Ald. 670.
(e) *Dry v. Borrell*, 1 Camph. 320; *Mair v. Glennie*, 4 M. & S. 244.

price charged at the colliery and the wages and pay of the crew. The captain had no interest or right of property either in the boat or the coals, and it was held that he was merely a servant of the owner, and not a partner with him in the coal trade. "The mode of paying him for his labour," observes Le Blanc, J., in delivering the opinion of the majority of all the judges (the case being a crown case reserved) "by allowing him a fixed proportion of the profit made on the sale beyond the price charged at the colliery, did not vary the nature of his employment, nor make him less a servant, than if he had been paid a certain price per chaldron or per day. (f)

The captain of a vessel engaged in the African trade having neither money nor credit, asked a sailor to go with him to a tradesman and order goods for shipment on board the vessel, telling him that he should have half the profit arising from the sale of the goods at the port of destination; and the sailor accordingly went and joined in the order, and the goods were sent on board, and the sailor and the captain were both made joint debtors for the goods in the tradesman's books; but it was held that there was no partnership between them in the things purchased, although they were jointly responsible for the price, and that the agreement as to the division of the profits of the sale was only a mode of compensating the sailor for his trouble and the loan of his credit. (g)

By an indenture inter partes made between the plaintiff of the one part, and the defendant of the other part, purporting to be an immediate sale and assignment of the practice of a surgeon and apothecary, and of the profits of the business, and of all the drugs and stock in trade, &c., the plaintiff covenanted that he would introduce the defendant to the patients, and would, during the space of one year from the date thereof, continue to reside on the premises where the profession or business was carried on, and carry on and attend to the practice as he had theretofore done; and the plaintiff, in consideration thereof, agreed to allow to the defendant during such period one moiety of the clear profits of the business to be paid at the expiration of the year, and it was held that this stipulation as to profits did not create a partnership during the year between the parties, but that it was merely a mode of paying the plaintiff for his services, and that the defendant, therefore, under a plea of set off, was entitled to give evidence of money received to his use by the plaintiff in the course of such business. (h)

(f) *Hartley's case*, Russ. & Ry., 141; Best, C. J.; *Witherington v. Herring*, 3 M. & P., 48, 49; *Meyer v. Sharpe*, 5 Taunt., 74; *Dry v. Boruett*, 1 Campb., 330,

(g) *Hesketh v. Blanchard*, 4 T. R. 144.

(h) *Raxlinson v. Clarke*, 15 Law, J., n. s. Exch. 171.

The same distinction between a compensation for labour and services in the character of a servant or agent of the copartnership proportioned to the profits and payable therefrom, and a share or interest in such profits, and in the partnership speculations in the character of a principal and partner in the firm, prevails in the French and continental law, where it is provided that when a merchant, instead of a fixed salary, agrees to give his agent a certain proportion of the profits, the agent shall not be considered, on that account, to be a partner with the merchant and subject to the contracts and liabilities of the co-partnership; and that when one person consigns goods to another to be sold, under an agreement that the consignee shall have the whole or a portion of the proceeds of the sale that may be realized beyond a certain specified amount, the consignee shall not, on that account alone, be considered a partner.(i)

When persons unite together for the purpose of carrying out a common undertaking for their mutual benefit, and some of them find the money, stock, and equipments necessary to carry it on, whilst others merely contribute labour in return for a share in the gross earnings, there is a community of interest, but no partnership as between the mere labourers in the undertaking, although there may be between those who furnish the capital and have an interest in the joint stock of the business. Thus where articles of agreement between the defendant, the master of a whaler, and the plaintiff, one of the sailors, stipulated that the produce of the voyage should be divided in certain proportions amongst the owners, the captain, and sailors, the proportion of a common sailor being a one hundred and nineteenth part, it was held that the sailors were not partners with the owners and captain in the whaling voyage.(k)

Payment of annuities out of the profits not making the payee a partner.—A person who merely lends money to a firm in partnership, to be employed in the business, or who receives interest for money advanced, is not a partner or joint adventurer in the business, as the money is payable at all events, and the right to receive it does not depend upon the contingencies and fluctuations of the trade.(l) If a partner withdraws from the firm leaving a certain amount of capital in the concern for which he is to receive interest and a terminable annuity payable at all events, this arrangement will not amount to a perpetuation and continuation of the preceding partnership.(m) But if sums professed to be received by way of interest, or an annuity, rise and fall with the accruing profits and the fluctuations of trade,

(i) *Pardessus*, Droit Commercial, No. 969.
Duvergier, Droit civ. tom. 5, No. 48, 56.
(k) *Wilkinson v. Frasier*, 4 Esp. 181; *Evans*

v. Bennett, 1 Campb. 300.
(l) *Elgie v. Webster*, 5 M. & W. 518.
(m) *Grace v. Smith*, 2 W. Bl. 998.

the party receiving such sums of money does not stand in the position of a creditor of the partnership, but in that of a joint speculator and adventurer in the profits and losses of the business, risking his money in the concern as a co-partner.⁽ⁿ⁾ "I think the true criterion," observes Sir William Blackstone, "(when money is advanced to a trader) is, to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending upon the accidents of trade. In the former case it is a loan, in the latter a partnership."^(o)

JOINT CONTRACTS *and* TRANSACTIONS *not making the parties thereto*
PARTNERS.

Joint purchases of goods.—If several persons join together in making a purchase of goods, they do not, by so doing, constitute themselves partners, unless they are jointly concerned in the subsequent disposal of such goods. If, for example, four persons agree to purchase a pipe of Madeira and afterwards to divide it amongst them for their own separate use and consumption, they do not, in contemplation of law, become partners in the transaction *inter se*, although they are part owners of the wine when purchased, and may be jointly responsible to the vendor for the price of it. But if the wine when purchased is to be resold upon the joint account of the four, they then become partners in the transaction.^(p) If such joint purchasers, intending to divide the goods as they are purchased, and not to deal with them afterwards for their joint profit, employ an agent to go into the market and make the purchase, or send one of their own body to strike the bargain, as the ostensible buyer, they do not become partners in the purchase, and are not even, as we shall presently see, jointly responsible to the vendor for the price; whether the ostensible buyer buys in one lot, and makes one purchase on behalf of all jointly, or makes several purchases on behalf of each individually.^(q)

Three persons agreed amongst themselves to purchase a quantity of oil. One of them was to be the buyer, and the others were to share in the purchase at the cost price. Hattersly was to have one-fourth, Pugh one-fourth, and the ostensible buyer the remaining moiety; and it was held that the three parties were not partners in the transaction.^(r) So where several persons employed a broker to buy tea for them, and the broker

⁽ⁿ⁾ *Gilpin v. Enderby*, 5 B. & Ald. 963; 1 D. & R. 576, s. c.; *Ex parte Chack*, 1 M. & Sc. 616, 617, 8 Bing. 469, s. c.
^(o) *Grace v. Smith*, 2 W. Bl. 1001. *Pell v.*

Brooke, cited ib. 999.

^(p) *Hoare v. Davies*, Doug. 371.

^(q) Post, ch. 30.

^(r) *Coope v. Eyre*, 1 H. Bl. 37.

bought in one lot, it was held that there was no partnership between the parties who employed the broker. "If such a transaction," observes Buller, J., "were sufficient to constitute a partnership, a broker would have it in his power to make five hundred persons partners who had never seen nor heard of one another, or might at his pleasure convert his principals into partners or not, without any authority from them. (s)

The same distinction founded on reason and common sense prevails in the civil and continental law. "If two or more persons," observes Domat, "wishing to buy the same thing, agree, in order not to raise the price by bidding against each other, to buy it jointly together, or to buy it through the medium of one of themselves, or through a third party, this agreement renders the thing bought the common property of all of them, but it does not join them together in partnership, for they are not bound together by the choice of the persons, but only by the thing which they have in common. (t) In every partnership there is a community of interest, but every community of interest does not create a partnership. (u)

Agreements to subscribe toward the formation of a joint capital and stock in trade, and to divide profits, not amounting to a present partnership.—Communications and agreements between parties with a view to the ultimate formation of a partnership, will not constitute them partners in an actually existing partnership. "If a person agrees to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, there is no contract of partnership until all those conditions are performed." (x) If several persons agree to share in a joint enterprise, and divide the profit and loss, and each agrees to contribute a certain amount to the joint stock, either in the shape of money or goods, there is no partnership between them, until the joint contributions are brought in, and the joint undertaking set afloat according to the agreement.

If a prospectus for the formation of a partnership states that the capital is to consist of a certain amount of money, to be divided into a certain number of shares, and that a deed of copartnership is to be executed, a subscriber who takes shares, and pays a deposit thereon, does not become

(s) *Hoare v. Dawes*, 1 Doug. 373.

(t) De la société, liv. 1, tit. 8, s. 3. Œuvres de Domat, ed. 1835, tom. 1, 265, 266. So by the Roman law. "In emptionibus qui nolunt inter se contendere, solent per nuntium rem erere in commune, quod a societate longe remotum est. Dig. lib. 17, tit. 2, lex 33.

(u) Domat, (Société,) tit. 8, Dig. lib. 17,

tit. 2, lex 31. "Toute société est une communauté mais toute communauté n'est point une société Duranton, 17, art. 320.

(x) Parke, J., *Dickinson v. Walpy*, 10 B. & C. 142. *Bourne v. Freeth*, 9 B. & C. 640. *Howell v. Brodie*, 8 Sc. 372. *Meigh v. Clinton*, 11 Ad. & E. 418.

a partner with the projectors and other subscribers, unless all the shares have been taken, the full amount raised, and the deed executed; unless he has expressly or impliedly assented to the launching of the partnership and the commencement of business by the managers and directors, with a less amount of capital, and a smaller number of shares and partners, and has waived the conditions precedent to the formation of the partnership.^(y) But if with a full knowledge of the terms of the partnership remaining unfulfilled, and of the conditions on which the partnership was to be formed being unaccomplished, he does acts amounting to an assent to the carrying on of the concern in its incomplete state, such acts amount to a waiver of the conditions, and he becomes a partner in an actually existing partnership.^(z) And a partnership *may* commence at once, although a deed of copartnership or of settlement has to be executed, and other things remain to be done at some subsequent period.^(a)

By an agreement between a firm in partnership and the defendant, a proposed dormant partner, it was stipulated that the defendant should bring into the business 1,000*l.* in money and 1,000*l.* in goods, and should be entitled to one-third of the profits; that the name of the firm should be changed, and the partnership commence from the first of April, 1839, but that the defendant should have the option of determining, at any period within twelve months of that day, whether he would become a partner or not. The 1,000*l.* in money and the 1,000*l.* in goods were accordingly brought into the firm by the defendant, and the name of the firm was altered from "B. and S. Vanderplank," to "B. and S. Vanderplank and Co.," (the name of the defendant (Evill) not appearing in the name of the firm;) and a new banking account, in the new name of the firm, was opened at the bankers; but the defendant, within the twelve months, declared his determination not to enter into the partnership, and it was held that he never had become a complete partner in the house.^(b)

An agreement to take shares in a provisionally registered joint stock company, is an agreement to become a partner in the company when it is duly formed and completely registered according to the provisions of the Joint Stock Companies' Act; and until the requisite shares have been allotted, capital subscribed, and the company completely registered and brought into existence as a fully formed partnership, the parties agreeing to take shares, and not taking an active part in the formation of the com-

(y) *Fox v. Frith*, 10 M. & W. 181. *Fox v. Clinton*, 4 M. & P. 676; 6 Bing. 776, s. c.
Pitchford v. Davis, 5 M. & W. 2.
 (z) *Tredwen v. Bourne*, 6 M. & W. 461.

Steigenderberger v. Carr, 3 Sc. N. R. 466.
 (a) *Battley v. Bailey*, 1 Sc. N. R. 143.
 (b) *Gabriel v. Evill*, 9 M. & W. 297.

pany, do not become partners; they stand merely in the position of persons who have agreed to become partners upon certain contingencies, and the happening of certain events; and until the conditions precedent have been accomplished, there is no partnership between them.(c)

Of a PARTNERSHIP in the PROFITS of a business or joint speculation, but not in the CAPITAL STOCK of the concern.

There may be a partnership as regards the accruing profits of a business or joint speculation, when there is no partnership, nor even a community of interest in the capital stock of the business. Thus where several persons unite together for the purpose of carrying on the business of common carriers of passengers and goods, and one finds a coach, and the others divide the road into districts, and each horses and conveys the coach through his own district, finding his own horses, harness, stables, and equipments, servants, and coachmen, and all things necessary for the purpose, there is no partnership in the stock in trade, although there is a partnership in the accruing profits.(d) So, (to cite an example from Pothier,) if the separate owners of two cows agree to send their milk together to market, and sell it for their joint benefit, there is no partnership in the cows, although the parties are partners in the sale of the milk. If goods are sent to a broker to sell, under an agreement that he is to have half of whatever he can get for them beyond a certain amount, there is no partnership in the goods, although he is a partner with the owner in the profits of the sale.(e)

If an author and a publisher agree to publish and sell a work upon joint account, and divide the profits of the sale, and it is stipulated between them that the author shall write the book, and furnish a certain quantity of manuscript, and that the publisher shall print and publish it at his own expense, receive the produce of the sale, and after deducting the expenses of the publication, divide the profits between himself and the author; here there is, it seems, no partnership in the unsold copies of the work, but only in the profits of the sale.(f) In many cases, however, where parties agree to manufacture a commodity to be sold on joint account, the one finding the raw material, and the other the labour and skill necessary for the purpose, there is a partnership between them in the manufactured article itself, as soon as it is completed and made ready for sale, as well as

(c) *Walstab v. Spottiswoode*, 15 Law J., n. s. Exch. 198, post, ch. 19.

(d) *Barton v. Hanson*, 2 Taunt. 51.

(e) *Smith v. Watson*, 2 B. & C. 401; 3 D. & R. 751. *Meyer v. Sharpe*, 5 Taunt. 74.

(f) *Wilson v. Whitehead*, 10 M. & W. 503.

in the profits of the sale. "Sometimes the labour and money," observes Puffendorf, in his chapter on Partnership, "are so interwoven together, as to give him, that contributed only his labour, a share even in the principal, the labour of the one and the money of the other being in a manner united into one mass. As when one lays out his money on unwrought commodities, and another exercises his labour in working them up and managing them. Thus, if I give a weaver 100*l.* to buy wool, and he makes cloth of it, computing his labour at 100*l.*, here it is manifest that we have both of us an equal interest in the cloth, and when it is sold the money ought equally to be divided: and I ought not to subtract the money that I contributed at first, and then divide with him the remainder." (g)

Of the inability of ONE of the PARTNERS to CREATE a FRESH PARTNERSHIP by introducing a THIRD PARTY into the business without the CONSENT of his CO-PARTNERS.

Of the distinction between public and private partnerships.—A partner in a private commercial partnership (not being a public joint stock company with transferable shares, post, ch. 19,) cannot introduce a stranger into the firm as a partner without the consent of all the members of the co-partnership. "If therefore," to use the language of the civilians which accords with the doctrines of our own courts upon the same subject, "one of the partners takes another person into partnership with him, this third person will not be a partner with the others, but only with the partner who has associated himself with him. This will make amongst them a second partnership, distinct from the first, and limited to the share of that partner who has so joined himself with another. (h)

(g) Puff. de jure nat. et gent. Lib. 5, ch. 8, 514, ed. 1729.

(h) Domat, de la Societé, tit. 8, s. 2, No. 5. *Ex parte Barrow*, 2 Rose, 255. Qui admittitur socius ei tantum socius est qui admisit, et recte.

Cum enim societas consensu contrahatur, socius mihi esse non potest, quem ego socium esse nolui: quid ergo si socius meus eum admisit, ei soli socius est. Dig. lib. 17, tit 2, lex 19. Nam socii mei socius, meus socius non est. Lex 20.

SECTION II.

LIABILITIES EX CONTRACTU OF PARTNERS INTER SE. (a)

Of the COMMON LAW MAXIM that ONE PARTNER cannot maintain AN ACTION against the FIRM upon PARTNERSHIP CONTRACTS.—It is an ancient maxim of the common law, that if a plaintiff in an action against a firm in partnership upon a partnership contract is himself a member of the firm, the action is not maintainable; for being himself liable as one of the partners upon all contracts binding upon the co-partnership, he is in principle, it is said, both plaintiff and defendant in the action, which cannot be permitted.

AN INDENTURE *inter partes* was made between HOUSTON (one of four partners in a bank) of the first part, Perring, Barber, Shaw, (the other three partners,) and HOUSTON, (the fourth partner,) bankers and co-partners of the second part, and Oliver Vill of the third part, which recited that HOUSTON, in his individual capacity, was indebted to "Perring, Barber, Shaw, and HOUSTON," in a considerable sum of money, the amount of which could not then be exactly ascertained, and that HOUSTON might become indebted to them in further sums of money, and that for securing to the said Perring, Barber, Shaw, and HOUSTON the payment of the said debt, and of what might thereafter become due to them from HOUSTON, the latter had assigned certain property to the said Oliver Vill as a trustee for the co-partnership, and had agreed to enter into the covenant thereafter set forth, and the deed then contained a covenant on the part of HOUSTON with Perring, Barber, Shaw, and HOUSTON, to pay to them the debt then owing, and all sums which might thereafter become due from him to them, and it was held that no action at law could have been maintained upon this covenant, as the parties suing thereon must necessarily have been both plaintiffs and defendants in the action. (b)

If, therefore, an indenture *inter partes* be expressed to be made between a firm in partnership by its trading name of the one part, and one of the partners in his own name individually of the other part, and such indenture contains covenants on the part of the firm with the one partner

(a) As to the plaintiffs in such actions, see ante, 282—285.

(b) *De Tastet v. Shaw*, 1 B. & Ald. 669.

individually, and the latter seals the deed in common with the other partners of the firm, the partner so sealing the deed cannot maintain an action upon it, inasmuch as he seals it as one of the members of the firm as well as on his own individual account, and is therefore both covenantor and covenantee in the deed.

IF BILLS OF EXCHANGE or PROMISSORY NOTES be accepted or given in the trading name of the firm, or be expressed to be accepted or given by some one or more of the partners for and on behalf of the co-partnership, and the payee of such bills or notes is himself a member of the firm, he cannot maintain an action upon them against the co-partnership. When one partner draws a bill on his own firm, by its trading name, and the bill is accepted by the firm in such trading name, it is the case, it has been said, of a man's drawing upon himself; he is both drawer and drawee, and if he sues the firm upon the bill, he is in principle suing himself, which cannot be permitted. (c) The rule, in fact, is that all partners ought to be made defendants in actions upon co-partnership contracts, as the contract is the joint contract of all of them, and not the separate contract of each partner; and a plaintiff, who sues on such a contract, without joining all, may be met by a plea in abatement. When, therefore, the plaintiff himself is one of the partners, and is met by such a plea alleging that he is himself a co-contractor, his action is defeated, for he cannot sue out a fresh writ making himself both plaintiff and defendant in the action.

But if the contract, though made concerning the partnership affairs, and in furtherance of the joint undertaking, is the individual contract of the partners who are parties to it; if it is made by them in their own names and not in the name of the firm, the objection does not, of course, apply. Thus, if a deed be expressed to be made between three of the partners, *nominatim* of the one part, and a fourth partner of the other part, and the three covenant *nominatim* with the fourth, then, as the deed is the individual contract of the parties executing it, and not the contract of the firm of which they are members, although it may be entered into for partnership purposes, and made concerning partnership affairs, there can be no objection to the fourth partner suing the other three upon their covenant.

Thus if a deed expressed to be made between A. and B., two out of several partners of a firm of the one part, and C., another partner, of the

(c) *Neale v. Turton*, 12 Moore, 368; 4 Bing. 149, s. c. *Mainwaring v. Newman*, 2 B. & P. 120, 125. *Teague v. Hubbard*, 8 B. & C. 345; 2 M. & R. 369. *Smith v. Jarvis*, 2 Raym. 1484.

other part, recites that D. has advanced 500*l.* by way of a loan to the co-partnership, and contains a covenant on the part of A. and B. with D. to repay D. the 500*l.* by a day certain, D. may maintain an action of covenant against A. and B. for the money, as the contract is not the contract of the firm at large, but the individual contract of the persons who are made parties to it.

So in the case of COVENANTS *and* AGREEMENTS *between* PARTNERS *to contribute CAPITAL or LABOUR to the* JOINT STOCK *of the* CO-PARTNERSHIP, *not to trade on* THEIR OWN ACCOUNT, &c., entered into by them in their own names with each other, each of the partners who neglects to fulfil his covenant is liable to an action at the suit of all the rest for the joint damage sustained by them in respect thereof, inasmuch as the contract is the individual contract of the different parties who thereby agree to become partners. The covenant of each covenantor is, in contemplation of law, made with all the rest excluding himself, and all the rest are joint tenants against him; "for if there be twenty partners, and one of them covenants with all the rest, he is in that respect several from them all, and they all joint against him." (*d*)

Thus, where an indenture tripartite entered into between Taylor of the first part, Clipsham of the second part, and Castle of the third part, recited that the three parties had contracted with his Majesty's commissioners of prize goods to buy and take all brandy wines which at any time before the first day of September then next coming should be condemned as lawful prize and ordered to be sold, at such rates and prices, and upon such conditions as were set forth in the contract with the commissioners. And each of the three did then for himself, his executors, &c., covenant and agree with the other and others of them respectively, and his and their respective executors, &c., that there should be a joint stock of 600*l.* to be raised equally by the parties, and deposited in the hands of Hynton, a goldsmith, to be disposed of by the parties, or any two of them, and that all the prize brandies should be bought by them in partnership, upon their joint account; and that none of the parties during the continuance of the partnership should sell, merchandize, or trade in brandy wines by himself only, or in company with any other, but only upon the same joint account; and that no brandies which should come to the hands of any of the parties should be sold by him without the assent of the others, in writing under their hands, and that the gain should be equally divided, and the loss equally borne; and that all the monies which should

(*d*) *Thimblethorp v. Hardesty*, 7 Mod. 117. *Vesey v. Mantell*, 9 M. & W. 325.

be received by any of the partners should be paid in to Hynton by the party who should receive it, to be disposed of as the joint stock was directed to be disposed of; it was held that one of the partners was liable to an action at the suit of the other two for a breach by him of the covenants contained in this deed. (e)

So where four fiddlers entered into articles of agreement under seal to play together for their joint profit, and bound themselves each to the other not to play asunder except on my Lord Mayor's day, it was held that one of them who had played by himself at a tavern for his own private advantage contrary to the agreement, was liable to an action at the suit of the other three for the recovery of the 20*l*. (f)

The herald painters entered into articles of co-partnership under seal in their own names individually, and covenanted each for himself with the other and others of them to work for their joint benefit, and bring all their work to one shop for sale, and divide the profits between them in certain shares and proportions, and it was held that one of the covenantors who had not brought his work to the appointed place was liable to an action at the suit of the other covenantees for his breach of contract. (g)

And as regards SIMPLE CONTRACTS *inter partes* between partners in their own names individually for the formation of a joint stock, and a contribution by each of them of a certain amount of capital, to be paid to the bankers of the co-partnership, or to one of such partners as a trustee for all the rest, any one of the partners neglecting to pay his share or proportion of the agreed capital, may be sued by all the rest, as the contract is in like manner with all the rest, excluding himself, he being in contemplation of law several from them all in respect of his particular share of the joint contribution, and they all joint against him. If several of the partners sign an agreement, constituting one of their number a trustee for the whole body, and authorizing him to sue for and receive their several contributions to the joint stock, each of the partners signing the agreement is liable to an action at the suit of the partner so appointed for not paying up his share of the contribution.

Twenty-two persons agreed to charter a small steam-boat to ply for hire with passengers and goods between London and Herne Bay during the winter season, and to share the profits and loss of the adventure. Some agreed to subscribe 50*l*., and others 25*l*., and all were to share in the

(e) *Eccleston v. Chipsham*, 1 Saund. 153; 2 Keb. 338, 347, s. c.

(g) *Saunders v. Johnson*, Skin. 401; Comb. 230, s. c.

(f) *Spencer v. Durant*, Comb. 115.

profits, and contribute to the losses in proportion to the amount of their several subscriptions. The plaintiff, one of the twenty-two parties who signed the agreement, and a subscriber of 50*l.*, was authorized to charter a suitable vessel, and to make the necessary arrangements for setting the scheme afloat, and each of the parties paid him 10*l.* per cent. for the purpose of defraying the expenses of the preliminary proceedings, and by the agreement they further bound themselves to pay to the plaintiff, each in proportion to his subscription, such further instalments as it might be necessary to call for from time to time should the earnings of the boat be insufficient. The steam-boat was accordingly chartered, and continued to ply until the end of the season, when the joint adventure being at an end, the accounts were made up and balanced, and it was found that the expenses had so far exceeded the earnings of the boat as to render it necessary for the plaintiff to call for an instalment from the subscribers to meet the deficiency. The defendant was therefore applied to as one of the subscribers for his share of the general contribution, according to the agreement, which he refused to pay, and it was held that the plaintiff was entitled to maintain an action against him upon the agreement for the recovery thereof. (*h*)

Six persons entered into articles of co-partnership as carriers of passengers; each agreed to horse and convey a stage coach for a certain number of miles in a given time, and in default to pay a forfeiture or penalty of 50*l.* as liquidated damages to the plaintiff, who was one of the six, and who was authorized to receive, and empowered to sue for such forfeiture when it occurred; and it was agreed that the amount should be divided amongst such of the parties to that agreement as should not have subjected themselves to any such forfeiture to the exclusion of every defaulter, and it was held that one of the six who had neglected to horse and convey the coach according to his agreement, was liable to an action, at the suit of the plaintiff, for the recovery of the 50*l.*, as liquidated damages for his breach of contract. "It has been insisted," observed Best, C. J., that this agreement makes the parties to it partners, and therefore, that if any of them have claims against the others they must go into a court of equity. In that which is sought to be recovered in this action the defendant has no interest whatever. It is a penalty to be paid by the plaintiff for the use of the other contracting parties, the defendant himself being by the terms of the agreement expressly excluded from any share in it. There are no accounts to be settled before this claim can be decided, and, there-

(*h*) *Brown v. Tapscott*, 6 M. & W. 123.

fore, there is no reason why the case should not be disposed of in a court of law, or why the parties should be subject to the delay and expense attending proceedings in equity. Courts of law should be careful not to narrow their jurisdiction. Whenever justice can be attained in a court of law, a suit should be prosecuted there in preference to driving the parties to their equitable rights The third objection is, that there is no mutuality in the agreement, for, that if the plaintiff incurred a penalty, he could not sue himself. That is a case not provided for by the agreement, and, therefore, all the other contracting parties who had incurred no penalty must join in the action against him, they would thus obtain equal redress though not precisely in the same manner. Where an act of parliament directs that a company shall sue and be sued in the name of their treasurer, or clerk, and he has a claim against them for wages, he cannot sue himself, but must, notwithstanding the provisions of the act, sue the company.(i)

An author and a publisher undertook the publication and sale of a work on their joint account and for their joint benefit: the author agreeing to supply a certain quantity of manuscript, and the publisher agreeing to print and publish the work at his own expense, and to divide the profits with the author, and the latter, after a portion of the work had been printed, refused to complete it, and it was held that the publisher was entitled to maintain an action against him for the damage he had sustained by reason of the non-performance of the contract.(k)

All partners, therefore, who have contracted with each other *nominatim* to contribute their labour or services to the common purposes of the partnership, or to add goods and chattels to the joint stock, or to bring money into one common fund for the joint benefit of all, are each liable to an action at the suit of all the rest, for the damage resulting to them from his breach of contract; (l) as is also every partner who has agreed not to trade on his own account—not to sell merchandize without the assent of the others—not to draw or indorse bills of exchange, or promissory notes, in the name or on account of the firm.

And so with all other simple contracts, if they are not made in the trading name of the co-partnership, and do not appear upon the face of them to be the contracts of the entire firm collectively, but are entered into by the partners in their own names as their own contracts individually; one partner who is sued thereon by another cannot discharge himself from

(i) *Radenhurst v. Bates*, 11 Moore, 429, 430; 3 Bing. 470, s. c.

(l) *Gale v. Leckie*, 2 Stark, 108; *Vennings v. Leckie*, 18 East, 7.

(k) *Gale v. Leckie*, 2 Stark, 107.

liability on the ground that the contract was in reality a co-partnership contract made on behalf of the firm.(*m*)

If *BILLS of EXCHANGE or PROMISSORY NOTES* be drawn by one partner on the others individually, and be accepted by any one or more of them, individually in their own names, no mention being made of the firm, the parties whose names appear on the face of such notes or bills are individually liable to the payee whether he is a partner with them in the firm or not, and whether the bill or note has or has not been given in respect of a partnership transaction, inasmuch as the contract is not in such a case the contract of the firm, but the contract of the individual partner or partners signing it.(*n*)

The rule of law that one partner cannot sue the rest of his co-partners upon contracts by the firm, in its trading name, and which appear upon the face of them to be the joint contracts of all the partners, has been pushed to a most inconvenient length, and is often productive of great hardship and inconvenience, as it deprives a partner of all remedy at common law for the recovery of money lent, or goods supplied, or work done by him for the benefit, and at the request, of the firm, (*o*) unless he has taken care to obtain the individual and personal security of the other partners for the repayment of the money, or the price of the goods and the work ;(*p*) and he is consequently frequently driven into courts of equity for relief, where no technical difficulty is allowed to stand in the way of strict and impartial justice.(*q*)

One of the absurd consequences of this rule is, that the partners in one house of trade cannot maintain an action against the partners in another house of trade, upon contracts made between the co-partnerships, if one of the partners of either house happens at the time of the making such contracts, to be a partner in both houses, whether the action be brought in the lifetime of the common partner, or after his decease.(*r*) "In this respect," justly observes Story, J., "the Roman law, the law of France, and the law of Scotland, present a marked contrast to the common law . . .

(*m*) *Higgins v. Senior*, 8 M. & W., 834.

(*n*) *Fox v. Fritch*, 10 M. & W. 131; *Siffkin v. Walker*, 2 Campb. 307; *Thimblethorpe v. Hardisty*, 7 Mod. 117; *Bawden v. Howell*, 3 M. & Gr. 638. Best, C. J., 12 Moore, 368; *Preston v. Stratton*, 1 Anstr. 50.

(*o*) He is not of course precluded from suing in respect of money lent or work done before he became a partner; *Lucas v. Beach*, 1 M. & Gr. 417, 1 Sc. N. R. 350.

(*p*) *Moffat v. Van Millingen*, 2 B. & P. 124 n.;

Perring v. Howe, 12 Moore, 146, 147; *Neale v. Turton*, ib. 365; *Goddard v. Hodges*, 1 Cr. & M. 37; *Sharpe v. Cummings*, 14 Law J., n. s. (Q. B. 10.) *Milburn v. Cod*, 7 B. & C. 419.

(*q*) By the Roman law every partner who had incurred expenses in the transaction of the common affairs of the firm, was entitled to compensation out of the joint stock. Dig. lib. 17, tit. 2, lex 52, § 4, lex 61.

(*r*) *Bosanquet v. Wray*, 6 Taunt. 597.

Mr. Bell, in his Commentaries, says, 'In Scotland, debts between companies in which the same individual is a partner, are every day sustained as quite unexceptionable.' It is to be lamented that the like rule has not been incorporated into the common law, treating the firm, for the purposes of the suit, as an artificial body, or quasi corporation. It would be highly convenient, and entirely conformable to the common sense of the commercial world."^(s) Since these observations of Mr. Justice Story were written, our legislature has, by the joint stock company's act, and other statutes, obviated the defect and inconvenience so far as it affects joint stock companies and public partnerships. (Post. chs. 19, 20.)

Of the inability of any one or more of the PARTNERS to compel a DISTRIBUTION of the PROFITS during the CONTINUANCE of the CO-PARTNERSHIP.

Covenants and agreements to account and divide profits.—If one partner, having the general conduct and management of the partnership business, has covenanted in his own name with another partner, to render accounts, at specific periods, of the state of the partnership affairs, and to divide the balance of profit remaining in hand in favour of the firm, after the satisfaction and discharge of the outstanding debts and liabilities, an action is maintainable against him by the covenantee for the non-performance of such covenant, so far as it relates to the render of the accounts,^(t) but there is no remedy against him at common law upon that part of it which relates to the division of profits, so long as the partnership continues, and the affairs and trading transactions of the firm have not been wound up and brought to a close. The true reason for this is the impossibility of determining, so long as the partnership is in full vigour, and exposed to the daily and hourly fluctuations and vicissitudes of trade, what profits have been realized and what there are to divide, as what is gained one week may be lost the next, and a partner who is a creditor of the firm to day may be its debtor to-morrow. If he were enabled to take from the partnership his share of the joint fund, or balance in hand, this month, he might have to refund it the next, to make good losses that had been sustained in the mean time, and satisfy the claims of the creditors of the firm, and to him, therefore, is applicable the ancient maxim of the civil law "*frustra petis quod mox restitutus esset.*" If, therefore, the partners cannot agree among themselves as to the time and manner of the distribu-

^(s) Story, on partnership, 323, n. 1, 345, n. 5.

^(t) *Owston v. Ogle*, 13 East, 541.

tion of the profits, those of them who insist upon the immediate division of such profits must resort to the court of chancery for a dissolution of the partnership, a settlement of the accounts, and a division of the balance that may be in hand after all the trading transactions have been wound up, and the joint affairs of the concern brought to a close.^(u)

It is obvious that the accounts of a general trading partnership cannot be satisfactorily taken with the view of making a division of the balance in hand, so long as the trading operations of the firm continue, and therefore it is that a bill in chancery, praying for an account, must at the same time pray for a dissolution.^(x) "There is no instance," observed Vice-Chancellor Shadwell, "of an account being decreed of the profits of a partnership on a bill which does not pray a dissolution, but contemplates the subsistence of the partnership. The opinion of Lord Eldon upon this subject has been from time to time expressed. Suppose the court should entertain such a bill, and direct an account to be taken of the dealings of a partnership, and that it appeared by the Master's report that a balance was due from the defendant to the plaintiff, then, upon further directions the plaintiff would ask for an order that the balance might be paid to him: it would, however, be competent to the defendant to file a supplemental bill, in order to show that since the account was taken, a balance had become due to him from the plaintiff, after giving the plaintiff credit for the amount found due to him by the Master; and thus the matter might be pursued with endless changes, and supplemental bills might be filed every year that the partnership continued, and a balance would never be ascertained till the partnership expired, or the court put an end to it."^(y)

But if the partnership is at an end, if it has expired or been dissolved, and all its trading transactions brought to a close, outstanding engagements liquidated, and an ascertained balance of profit remains in the hands of one of the late partners upon a general settlement of the accounts, an action is then maintainable for the recovery of such balance. Thus, where the plaintiff and defendant entered into articles of copartnership under seal, which contained a covenant to account yearly and adjust and make a final settlement at the expiration of the partnership, and the partnership was dissolved and an account taken, the balance of which was found to be in favour of the plaintiff, and was promised to be paid by the defendant, it was

(u) An action by one partner against the others for an account was considered by the Roman law a dissolution of the co-partnership. Dig. lib. 17, lit. 2, lex 65.

(x) *Forman v. Homfray*, 2 Ves. & B. 329.

(y) *Loscombe v. Russell*, 4 Sim. 10; *Knebell v. White*, 2 Y & C. 21.

held that an action of assumpsit was maintainable by the plaintiff upon such express promise.⁽²⁾

The plaintiff and defendant having been for some years in partnership as auctioneers, agreed to dissolve partnership. They accordingly advertised the dissolution in the Gazette, and subsequently met together and adjusted their accounts, and, after all the books had been produced and examined, it appeared that there was a balance of 215*l.* due to the plaintiff in the defendant's hands, which the defendant offered to pay to the plaintiff upon certain conditions which he had no right to impose. The plaintiff accordingly brought his action to recover the amount, and it was held that the action was maintainable. "The account," observes Gibbs, C. J., "having been settled between the plaintiff and the defendant after the dissolution of the partnership and a balance struck, the partner who has a balance in his favour has a clear right of action to recover it. My brother Lens mistakes in supposing that it is necessary that there should be an express promise to pay such balance. The action is brought upon an implied undertaking; this I consider to be sufficient. The dissolution of the pre-existing partnership and the mutual settlement of an account are a sufficient consideration in law for an implied promise to pay a balance on the side of the partner from whom such balance is due."^(a)

So where the plaintiff and defendant had been jointly engaged in the sale and purchase of wool, and had had divers other joint transactions together, which were brought to a close and a general account was stated between them which showed a balance in favour of the plaintiff of the amount of 15*l.*, and opposite that sum the defendant wrote "due from me to Mr. Wray," (the plaintiff,) it was held that the law would imply a promise from the defendant to pay over the amount, and that an action was maintainable to recover it.^(b)

Two partners in the working of a coal mine having worked out the mine, balanced the profit and loss of the concern with the exception of some small coal on the coal-pit hill, and some debts due to the firm, and accounts to a small amount which were not then come in. The materials and utensils used in working the mine were valued by a third party at the sum of 17*l.* 19*s.* 9*d.*, and one of the partners agreed to take the whole of them at that valuation. They were accordingly handed over to him, and the other partner subsequently brought an action for a moiety of the amount, when it was contended that the action could not be maintained, as

⁽²⁾ *Foster v. Allanson*, 2 T. R. 479. *Moravia v. Levy*, ib. 483, n.

^(a) *Rackstraw v. Imber*, Holt, N. P. C. 370. *Sharp v. Warren*, 6 Pr. 127.

^(b) *Wray v. Milestone*, 5 M. & W. 21.

there had been no *final* settlement of the partnership accounts and no express promise from the one partner to the other to pay a moiety of the valuation, but the judge told the jury that if they were of opinion that the partnership was dissolved, and that the footing on which the defendant took the utensils was that he was to pay for one half of them, the plaintiff would be entitled to a verdict, and the jury accordingly found a verdict for the plaintiff for the sum of 85*l.* 19*s.* 10*d.*, being a moiety of the valuation, and it was held that the direction was substantially correct, and that the plaintiff was entitled to recover the amount.(c)

And when weekly or monthly accounts have been regularly made up and assented to, and rendered by the copartnership, and the balances appearing to be due on the face of these accounts to a particular partner have not been carried forward from one account to another, and the partnership is dissolved before payment of such balances, each account is to be taken as a final account and final settlement to the period at which it is dated, and an action is consequently maintainable for the recovery of such balances against the parties from whom they appear upon the face of such accounts to be due.(d)

Several persons who had been partners in divers joint undertakings which had been brought to a close, submitted all their accounts and certain differences between them to arbitration, and the arbitrator awarded, amongst other things, that a certain sum of money should be paid by one of the partners to another, and it was held that the partner in whose favour the award had been made might bring an action of debt on the award against the other for the amount.(e) So where a colonial court decreed the payment of a balance which it found to be due from one partner to another, it was held that the law would imply a promise from the partner from whom the money had been ascertained to be due, to pay over the amount to the other, and that an action might be maintained thereon for its recovery.(f)

If the partnership is confined to one particular transaction, if the parties have merely agreed to divide the profits of one joint adventure, there can be no objection, as soon as the joint undertaking has been accomplished and brought to a close, and all outstanding debts and liabilities in respect thereof satisfied and discharged, to one of the partners bringing an action for his share of an ascertained balance which has been received by another. When the object for which the partnership was formed has been attained

(c) *Jackson, v. Stopherd*, 2 Cr. & M. 361.

(d) *Brierly v. Cripps*, 7 C. & P. 709.

(e) *Winter v. White*, 3 Moore, 674; 1 B. &

B. 350.

(f) *Heney v. Soper*, 8 B. & C. 160; 2 M. & B. 153, s. c.

the partnership is in fact at an end "extincto subjecto, tollitur adjunctum."^(g) "Whenever two or more persons," observes Pothier, "have entered into partnership for the accomplishment of a certain business, this partnership will be at an end when the enterprize has been consummated. For example, when two merchants have entered into partnership to buy a certain quantity of merchandize together and sell it at a particular fair for their joint profit, it is manifest that the partnership will be at an end when the merchandize has been disposed of."^(h) Therefore, if two persons not being continuing partners in trade, ship goods on board a vessel on their joint account, sell them in a foreign port and invest the produce of the sale in a return cargo, which is received and sold by one of the partners on the ship's return home for the mutual benefit of the two, and the partner so selling receives the produce of the sale, discharges all the expenses of the voyage and joint undertaking, and then renders an account to his co-partner of the receipts and disbursements of the voyage and of the balance in hand, an action is maintainable by the latter for the recovery of his share of such balance.⁽ⁱ⁾

Certain coach proprietors had an account made out at the end of each month setting forth the names of the parties concerned in working the coach, the amount of the receipts and disbursements, the number of miles worked by each, and the proportions of the gross earnings to which each was entitled, and one of these monthly accounts was made out and agreed to and sent to the plaintiff, and it appeared upon the face of such account that a certain sum was due from the defendants to the plaintiff for the horsing of their coach by the latter for one stage, from February to October, it was held that the plaintiff was entitled to recover from the defendants the amount so appearing to be due to him, and that the account was admissible in evidence without a stamp.^(k)

But if it appears that the parties are continuing partners in trade, so that the profit upon one transaction may be absorbed by the losses upon other subsequent transactions, no action is maintainable for the balance of profit appearing upon any one particular statement of accounts respecting bygone transactions completed and done with, for the reasons already stated. Thus where two joint proprietors of a stage coach running between Bath and London agreed that each should horse the coach for a

(g) So by the civil law. Si alicujus rei contracta societas sit, et finis negotio impositus est, finitur societas. Instit. lib. 3, tit. 26. §. 6. Dig. lib. 17, tit. 2, lex. 65, § 10.

(h) Pothier, (Société,) No. 143.

(i) *Wilson v. Cutting*, 4 M. & Sc. 268; 10 Bing. 436. *Owston v. Ogle*, 13 East, 538.

(k) *Goodyear v. Simpson*, 15 Law J., n. s. (Exch.) 191.

certain part of the journey and provide all the requisites for the purpose, and that they should share the profits in proportion to the distance to which each ran the coach, and the coach was horsed according to the agreement, and one of the partners received the whole of the fares and earnings of the coach, and made out weekly accounts of the receipts and disbursements, and forwarded them to his co-partner, and the latter claimed the balance stated to be due upon the face of such accounts, it was held that the claim could not be sustained, as there appeared to be other general and unsettled accounts respecting the business between the partners.^(l) So where the proprietors of a stage coach agreed among themselves that each should horse the coach for certain stages and receive the payments, and make the requisite disbursements on such stages, and it was the practice for one or more of the partners to make up every month, and to send round to the other partners, a written account from the way-bills showing the receipts and disbursements of each proprietor, the share of net profits due to each, and the proprietors by whom, and those to whom the ascertained shares of such profits should be paid, and the payments were then made accordingly, it was held that an action could not be maintained by one of the partners against another upon one of these accounts, for a balance so adjusted and stated to be due to him.^(m)

And it has been held even in the case of partnerships in particular transactions, where the joint undertaking has been brought to a close, and the earnings have been received by one partner, who renders an account to another, that if there are disputed items in the account, such disputed items cannot be struck out and the party allowed to recover the balance appearing to be due to him after deducting such disputed items. Two shipbrokers, for example, agreed to apply to a shipowner for permission to advertise his ship for a voyage to Van Diemen's Land, they jointly undertaking to procure a full cargo for certain commissions to be paid to them. The owner of the vessel acceded to their proposal, the ship was advertised, and the two brokers jointly exerted themselves to procure a cargo and passengers. One of them received the earnings of the vessel, paid all the disbursements and rendered an account to the shipowner, claiming a commission of 5% per cent. on the sum of 1,800*l.*, amounting to 65*l.* The shipowner admitted the general correctness of the account, but disputed the right to claim more than 60% for commission. The broker, however, having

^(l) *Fromont v. Coupland*, 9 Moore, 325; 2 Bing. 171; 1 C. & P. 275, s. c.

^(m) *Carr v. Smith*, 5 Ad. & E. n. s. 128—138.

retained in his hands the full amount out of the monies he had received, persisted in his claim, and the account remained unsettled. Things being in this state, it was thought that the other broker was at all events entitled to his share of so much of the commission as remained undisputed in the hands of his copartner, and an action was accordingly brought for its recovery; but it was held, contrary to the opinion of Bayley, J., that the action was not maintainable.⁽ⁿ⁾ If a similar case were again to occur, it is extremely probable that a different decision would be arrived at. "The owners of the ship," observes Bayley, J., in expressing his dissent from the opinion of the majority of the court, "as I understand, acquiesced in the accuracy of the account with the exception of the sum of 65*l.* retained for commission, which they insist ought to be reduced to 60*l.* Now I think that when the defendant got that sum of money into his possession for the joint benefit of himself and the present plaintiff, all other partnership matters being entirely at an end, and the sum in dispute being that single item, and that only, the policy of the law of partnership does not require that the plaintiff should go into a court of equity to take an account, when all that the defendant is called upon to account for is, one moiety of a liquidated sum of 60*l.* This strikes me to be the reason and justice of the case."^(o) So observes Lord Ellenborough, "If there have been partnership dealings, and only one item remains unadjusted, the difficulty as to partnership would disappear."^(p)

Contribution between partners.—Upon the same principle it is that no action is maintainable to recover from one or more of several continuing partners in trade contribution towards the losses and expenses of the copartnership, when there is a joint fund, the common property of the copartnership, out of which the losses and expenses of the business ought primarily to be paid.^(q) The courts of common law have thought fit to profess themselves utterly unable to investigate partnership accounts, to examine the profits and losses of trade, and ascertain whether there is or is not a sufficient balance in hand, to satisfy and discharge outstanding debts and liabilities; and therefore whenever the right of contribution depends upon the state of partnership accounts and dealings and the existence of a balance in hand the claimant has no remedy in any court of common law, but must resort to a court of equity for relief.^(r) But when the partner-

(n) *Bovill v. Hammond*, 6 B. & C. 149.

(o) 9 D. & R. 188, s. c.

(p) *Robson v. Curtis*, 1 Stark. 79.

(q) *Rearson v. Skelton*, 1 M. & W. 504.

(r) *Sadler v. Nixon*, 5 B. & Ad. 936. *Sharpe v. Cummings*, 14 Law J., n. s. (Q. B.) 10. *Brown v. Tapscoot*, 6 M. & W. 123. As to the right to contribution in the Roman law, Dig. lib. 17, tit. 2, lex 57.

ship is at an end and the trading operations are wound up and completed, a right to contribution as between those who have been lately partners may under certain circumstances exist.

Thus where several partners subscribed together and formed a joint fund for the purpose of carrying on the partnership business, and confided the administration of this fund to one of the partners, who was to have the management of the concern, and agreed to pay him certain further instalments in case the joint fund in hand should be found insufficient to defray the expenses, and the partnership turned out a losing speculation, and all the money subscribed was spent, and the plaintiff incurred expenses considerably beyond the amount he had received, and the business was then brought to a close and the accounts made out and shown to the defendant, one of the partners, who promised to pay to the plaintiff his proportion of the loss, but failed so to do, it was held that the latter was entitled to recover it in an action on an account stated. "It appears," observes Parke, B., "that the earnings were admitted to be insufficient to pay the expenses; that application was made to the defendant by the plaintiff for the second instalment, and that he promised to pay it. This appears to be sufficient evidence to support the count on an account stated as to that sum founded on the obligation to pay it arising out of the special contract."^(s)

And if the partnership has been confined to a particular transaction and joint speculation, which has proved to have been a losing adventure, and one partner has been compelled to pay the whole loss, or more than his proper proportion of it, such partner may, if the joint undertaking has been brought to a close, and there are no open and unsettled accounts respecting the matter, and nothing more to be received in respect thereof, maintain an action against his late copartner in the business for his share of the contribution towards the common loss.^(t) There may also, during the continuance of the partnership, be particular joint transactions between one or more of the partners individually, on their own private account, not mixed up with the general partnership accounts, which may give rise to a right of action for contribution by one of the partners against another. Thus where an action was brought against two of several partners in respect of some matter growing out of the partnership transactions, and they jointly retained an attorney to defend them; and one of the partners was subsequently compelled, under a threat of legal process from the

^(s) *Brown v. Tapscott*, 6 M. & W. 123.

^(t) *Burnell v. Minot*, 4 Moore, 342. *Venning v. Leckie*, 13 East, 7. *Osborne v. Harper*, 5 East, 225. *Wright v. Hunter*, 1 East, 19.

Graham v. Robertson, 2 T. R. 282. *Hutton v. Eyre*, 1 Marsh. 603. *Holmes v. Williamson*, 6 M. & S. 158.

attorney, to pay out of his own private purse the whole amount due to the attorney for the joint defence; it was held, that the partner so paying the money was entitled to an action for contribution against the others, to recover from them their several shares of the joint payment, as in the case of ordinary joint contractors.(u)

Particular transactions between partners not connected with the general account of profit and loss.—Persons are not, although they may happen to be general partners in trade, precluded from suing each other upon special contracts entered into with each other individually on their own private account, although such contracts may be made concerning the partnership business, and be intended to promote the general prosperity of the copartnership. If one partner, for example, lends money to another to be employed in the business, or pledges his own private credit to enable his copartner to obtain money or goods for the purpose of making up his proportion of the contribution to the general stock, the partner who has so lent his money, or pledged his credit, would have the same remedy against the copartner in whose favour he had acted, as any third party would have,(x) as the transaction is a private matter between the partners, totally distinct and insulated from the general partnership dealings, and the general account of profit and loss. So if one partner receives money which properly belongs to his copartner, and not to the partnership, and appropriates it by mistake to the use of the firm, he is of course responsible to the partner whose separate money it is, for the repayment to him of the amount.(y)

The plaintiff, the defendant, and the plaintiff's brother, were jointly engaged in partnership in the butter trade, the plaintiff and his brother buying the butter in Ireland, and consigning it to the defendant, to be sold in London for the joint benefit of the three. A large quantity of butter being required by the defendant for sale, the plaintiff's brother contracted with various Irish dealers for a supply, and asked the plaintiff to accept certain bills of exchange, to be tendered in payment of the butter in Ireland. In order to cover the risk of the transaction, and secure the due transmission of funds to meet the bills when they became due, the plaintiff procured from the defendant, the London partner, the following guarantee:—"Sir—Your brother having drawn two bills on you, one for 228*l.*, due the 28th inst., another for 300*l.*, due the 4th of January next, on account of butters sold here for our joint account, the proceeds of

(u) *Edger v. Knapp*, 6 Sc. N. R. 712, 717.

(x) *Elgie v. Webster*, 5 M. & W. 518. *Ex parte Notley*, 1 Mon. & Ayr. 48. *Bonquet*,

J., Helme v. Smith, 5 M. & P. 744; 7 Bing. 714, s. c. *Heaketh v. Blanshard*, 4 East, 144.

(y) *Smith v. Barrow*, 2 T. R. 476.

which are now in my hands, if you will accept the bills, I hereby engage to provide for them when at maturity." The plaintiff accordingly accepted the bills, but no money having been sent him by the defendant, his London partner, he was obliged to pay them when due out of his own pocket; and it was held that the plaintiff was entitled to recover the amount from the defendant, notwithstanding the partnership, as the bill transaction was a private matter between the two, totally distinct and separate from the general partnership account. "I abstain," observes Best, C. J., "from giving any opinion as to the question of variance, (upon the special count on the guarantee,) it being quite clear that the plaintiff is entitled to recover on the count for money had and received. It has been objected that this is a partnership transaction, and no doubt the money came to the defendant as the money of all the three partners; but that which transpired between the plaintiff and the defendant took it out of the joint or partnership account, and placed it to that of the plaintiff. The defendant says, I have money in my hands, the produce of certain butters, and if you will accept certain bills, I will hold the money on your account, in case of your being called on to pay the bills. When the bills were paid, therefore, the money in the defendant's hands became separated from the partnership account; and where a contract is executed, as by the payment of these bills, the party may recover on the common counts, though it is necessary to resort to a special count, where the contract is executory.(2)

Two persons who were partners in the proceeds of a particular voyage, settled and adjusted their accounts as to that voyage; and upon that settlement of the accounts, it was agreed that the defendant should pay the broker's commission; and in consideration of his undertaking so to do, the plaintiff allowed him a much larger share of the profits than he would otherwise have been entitled to. The defendant, however, broke his word, and the plaintiff was obliged to pay the broker himself, whereupon he brought an action against the defendant to recover the amount; and it was contended that this was a partnership debt, that the money had been paid by the plaintiff on his own account as much as on account of the defendant, and that it could not be recovered upon the common count in the declaration, as money paid for the use of the defendant; but it was held that the agreement between parties had made the amount the individual debt of the defendant, and that it was the same as if the plaintiff, at the time of the settlement of the accounts, had handed over the money

(2) *Coffee v. Drian*, 3 Bing. 54, 10 Moore, 345.

to the defendant to pay the broker, and the latter had omitted so to do. (a)

Of the DISSOLUTION of a PARTNERSHIP as between the partners themselves.

Partnerships at will.—If no time has been limited for the dissolution of a general trading partnership, it is a partnership at will, and may be dissolved at any time at the pleasure of any one or more of the partners. (b) If the copartnership has been contracted by parol, it may be renounced by parol; but if it has been established by deed, the renunciation and disclaimer of it by the party who withdraws from the firm ought to be made by deed. The renunciation in the case of a general trading partnership cannot of course have a retrospective effect; it cannot affect the position of the partners *inter se* as regards the joint transactions and undertakings already commenced, and then in actual operation. "All the subsisting engagements must be wound up, but the parties cannot enter into any new engagements." (c) And in the case of partnerships in particular transactions, such as the profit and loss of a particular voyage, or the manufacture and sale of a particular article, or the completion of a piece of work undertaken by two or more persons on joint account, and for their joint profit, there can be no withdrawal by one of the partners in the joint undertaking to the prejudice of the others, after the joint enterprise has been fairly commenced. "A fraudulent and unseasonable renunciation is never permitted, whether the contract of partnership has provided against it or not. For this would be repugnant to that fidelity which being essential to the contract of partnership, is always understood to be comprehended in it. If a partner quits whilst he is on a journey, or engaged in any other business for the copartnership, or if his quitting obliges the partners to sell any merchandize before the time, he shall be bound to make good the loss and damage which his leaving the partnership under the circumstances shall have occasioned." (d)

A partnership will also be dissolved by the bankruptcy, or insolvency or death of any one or more of the partners, (e) or by his outlawry or attainder for treason or felony, (f) and also by the marriage of a female partner. (g)

(a) *Wilson v. Cutting*, 10 Bing. 436; 4 M. & Sc. 268, s. c.

(b) So by the civil law, "manet autem societas eousque, donec in eodem consensu perseveraverint. At cum aliquis renuntiaverit societati solvitur societas. Instit. lib. 3, tit. 26, § 4. Dig. lib. 17, tit. 2, lex 65, § 3.

(c) Lord Eldon, *Peacock v. Peacock*, 16 Ves.

57.

(d) Domat, (société,) tit. 8, s. 5, No. 3, 7. Dig. lib. 17, tit. 2, l. 14, 65.

(e) *Fox v. Hanbury*, Cowp. 445. Dig. lib. 17, tit. 2, lex 65.

(f) *Collyer on Partnership*, 68—75, 154.

(g) *Nerot v. Burnand*, 4 Russ. 260.

Partnerships for terms of years.—If the partners have agreed that the partnership shall continue for a definite period, it can only be dissolved before the expiration of the time limited by the mutual consent of all the parties, or by the bankruptcy, outlawry, felony, or death of any one or more of them, or by the decree of a court of equity. If the copartnership for an unexpired term has been created and constituted by deed, the mutual agreement of the partners to dissolve it must (at common law) likewise be established and authenticated by deed. But if the relationship has been contracted by simple contract, the agreement to dissolve it may be made by simple contract.^(h) The partnership is also dissolved by the death or insolvency of one of the partners, or by an act of bankruptcy, followed up by fiat and adjudication, and also by assignment by one partner of his share and interest in the business.⁽ⁱ⁾ And a dissolution by one partner is a dissolution as to all; so that the affairs of the old concern must be wound up from the day of the retirement.

SECTION III.

PARTNERSHIPS AS REGARDS THE PUBLIC AND THIRD PARTIES.

Liabilities of partners to third parties upon contracts under seal.—Although a partner may sue, as we have already seen, upon a covenant made with him in his own name, or with the firm, by its trading appellation, although he has not executed the deed, yet he cannot be sued thereon. In order to make him liable upon a deed, it must be shown that he actually sealed and delivered the deed in person, or that it was done by another for him, *in his presence*, and by his commandment; ^(a) or if executed by one partner on behalf of the firm generally as the deed of the partnership, it must be shown that the partners sued upon it authorized their copartner to execute the deed by a power of attorney under seal. ^(b) One partner has no implied authority to bind the others by deed. Thus, where a deed *inter partes* was expressed to be made between

(A) Eodem modo quo ligatur eodem modo dissolvitur ante, 144.

(i) *Fox v. Hanbury*, Cowp. 445. *Ex parte Smith*, 5 Ves. 295. *Vulliamy v. Noble*, 3 Mer. 610. *Heath v. Samson*, 4 B. & Ad. 175.

(a) *Ball v. Dunsterville and Lord Lovelace's case*, ante, 8. 9. *Burn v. Burn*, 3 Ves. 573. *Hall v. Bainbridge*, 1 Sc. N. B. 151.

(b) *Horsley v. Rush*, cited 7 T. B. 209.

the several partners of a firm of the first part; certain other persons of the second part; and the plaintiff of the third part; and the deed was executed by one of the partners for himself and his copartners, but the copartners were not present at the execution of the instrument, and had not given any authority under seal to their copartner to execute deeds in their behalf; it was held that the deed was the sole deed of the partner who had signed and executed it, and that the others could not be sued thereon.(c) So where the joint security of a firm in partnership was intended to be taken for the payment of a debt, and one of the partners caused a bond to be made out in the name of the firm, "Davis and Marsh," and sealed and delivered it as the deed of the partnership, it was held that it could not bind the other partners of the firm, as they had given their copartner no authority under seal to enter into and execute deeds in their behalf or on behalf of the firm; and that it could operate only as the sole deed of the partner who had executed it.(d)

The acting of one partner for another is analogous to the case of an agent acting for his principal, who cannot bind his principal by deed without being authorized by deed so to do. When it was contended before Lord Kenyon, that by the usage of merchants a partner was considered to be empowered to bind his copartners by deed as well as by bills of exchange and promissory notes, his lordship observed, that although in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted but that one partner might bind the rest, yet that the power of binding each other by deed was then for the first time insisted upon, and would, if permitted, be attended with alarming consequences. "It has been said," he observes, "that if a partnership be constituted by writing under seal, that gave authority to each partner to bind the others by deed: but I deny that consequence just as positively as the former; for a general partnership agreement, though under seal, does not authorize the partners to execute deeds for each other, unless a particular power be given for that purpose. This would be a most alarming doctrine to hold out to the mercantile world; if one of the partners could bind the others by deed, it would extend to the case of mortgages, and would enable a partner to give to a favourite creditor a real lien on the estates of the other partners."(e)

(c) *Harrison v. Jackson*, 7 T. R. 207. *Steig-
litz v. Egginton*, Holt, N. P. C. 141.
(d) *Elliot v. Davis*, 2 B. & P. 339.

(e) *Harrison v. Jackson*, 7 T. R. 210.

LIABILITIES *of* ACTUAL *and* NOMINAL PARTNERS *to* THIRD PARTIES *upon*
SIMPLE CONTRACTS.

Of the power of any one or more of the partners to bind the firm by SIMPLE CONTRACT.—But as regards simple contracts the case is different. Every one of the partners, in a general trading partnership, is, in contemplation of law, in the absence of any known controlling stipulation between them, clothed with an implied authority to enter into simple contracts, on behalf of the firm in furtherance of the ordinary business of the co-partnership, and to use the trading name of the firm in all such contracts and in all dealings and transactions in respect of which partners in such trade usually have authority to bind one another, and each of the partners is individually liable for the performance of such contracts in the same manner as if they had been entered into personally by himself. “This is a consequence not confined to the law of this country, but extending generally throughout Europe; and it is founded partly with the object of favouring commerce that merchants in partnership may obtain more credit in the world.”(f) “We are considered,” observes Pothier, in his Treatise on the Law of Obligations, “to have contracted through the medium of our partners, when they contract, or are regarded as contracting for the affairs of the partnership. For by entering into partnership with them, and permitting them to transact the business of such partnership, we are deemed to have adopted and approved beforehand of all the contracts which they may make in discharging the functions of the co-partnership, just as if we ourselves had contracted conjointly with them.”(g)

But this implied general authority is confined to general partnerships in trade, where the partners are jointly interested in the capital stock of the business, as well as in the profits accruing therefrom, and does not extend to partnerships in particular transactions and to limited partnerships in profits where the partner has no interest in the capital and joint stock of the concern. Thus where an author and publisher agree to publish a work for their mutual profit, upon the understanding that the author is to write the book, and the publisher to print and publish it at his own expense, there is no implied authority from the author to the publisher to contract for the supply of paper, or for the printing, or for

(f) Tindal, C. J., *Fox v. Clifton*, 4 M. & P. 712. *Helsby v. Mears*, 5 B. & C. 504.

(g) Pothier, *Traité des Obligations*, No. 83, ed. Dupin, p. 47.

any other matter necessary for the publication of the work, and the author cannot consequently be made responsible for the price of the paper, or printing, or advertisements, or anything else ordered by the publisher for the purposes of the publication. (*h*) So where several coach proprietors agree to undertake the carriage of passengers and parcels on a certain line of road for their mutual profit, and divide the road into districts, and each proprietor horses and conveys the coach over his own district, finding his own horses, harness, and servants, stables, hay, straw, and horsekeepers for the execution of his share of the undertaking, the one has no authority to bind another by contracts for the employment of servants, or for the purchase of horses, hay, straw, or any other thing necessary for the carriage of the passengers. If, therefore, hay and corn are furnished to one of the partners for the use of the horses drawing the coach along his part of the line, the other partners cannot be made responsible for the payment of the price of them. (*i*) But they are each clothed with an implied authority to enter into all customary and reasonable contracts with the passengers for their conveyance, and all consequently may be bound thereby, (*k*) and if one of them, whose business it is to hire coaches, contracts with a coachmaker for the supply of coaches along the whole line of road, and not merely for his particular district, this is a contract with the whole, and all are jointly responsible upon it. (*l*)

The partnership also, in the case of general trading partnerships, where there is a joint interest in the stock in trade as well as in the accruing profits, and where this implied general authority from one partner to contract on behalf of the firm has been held to exist, must be completely formed and established and set in motion before the implied power or authority can arise. If, for example, several persons agree to unite together in partnership and to raise a joint stock, and one borrows money, and another procures goods to make up his share of the joint contribution, the one is not liable for the debt contracted by the other, as the partnership is not fully formed, and the partner is not acting in discharge of the ordinary functions of the co-partnership, but on his own private account. "Suppose several persons agreed to open a banker's shop, and it was agreed that each partner should bring into the house a certain sum of money as his share, it could not be contended that if one of them were

(*h*) *Wilson v. Whitehead*, 10 M. & W. 503.

(*i*) *Barton v. Hanson*, 2 Taunt. 49.

(*k*) *Helsby v. Mears*, 8 D. & R. 289.

(*l*) *Arthur v. Dale*, Collyer on Partnership, 330.

to borrow money for his share, all the others would be liable for it." (m) But as soon as the partnership is in actual operation, and has begun business on the joint account, all those of the intended partners who assent to the commencement of the trading operations for their common benefit, or take an active part in promoting them, become, as we have before seen, present and complete partners in the undertaking, and impliedly accord to each other all such powers and authorities as are usual and reasonably necessary to enable them to discharge the functions of the co-partnership, and carry the common object into effect.

Any restriction which, by agreement amongst the partners, is attempted to be imposed upon the authority which one possesses as a general agent for the other is operative only as between themselves, and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such restriction has been made. (n) "Be the reciprocal rights and liabilities of partners what they may," observes Mr. Bell in his Commentaries on the Laws of Scotland, "in respect to each other, they each, in their relation to the public, hold an authority which no force of private stipulation can alter or restrain; and by means of which, in the face of the most express injunctions or prohibitions of their contract, the several partners, or even those perhaps who may long have left the partnership, may, by the act of any one of the members, be made responsible to third parties to the whole extent of their private fortune." (o) Every one of the partners is responsible for things done within the scope of this implied authority, although they be done in fraud of the partnership, unless the plaintiff who seeks to charge the co-partnership upon the fraudulent dealing of the single partner was himself a party, or in any way privy, to the fraud.

Agreements inter partes.—If, therefore, a simple contract *inter partes* concerning the partnership affairs and business is entered into by one or more of several partners in the trading name of the firm, or is expressed to be made by them on behalf of the firm, or in their own names, without mention of the co-partnership, all the partners are individually liable upon such contracts, and may be sued thereon, whether their names do or do not appear upon the face of the written instrument. They stand in the same position as an undisclosed principal who has entered into a simple contract in writing *inter partes* in the name of an agent, and who may, as we have already seen, sue and be sued upon such contract, al-

(m) Kenyon, C. J., *Saville v. Robertson*, 4 T. R. 728. *Smith v. Craven*, 1 Cr. & J. 500. *Greenlade v. Dover*, 7 B. & C. 638.

(n) *Hawken v. Bourne*, 8 M. & W. 710.
(o) *Bell's Comm.* 611, ed. 1826.

though he is not mentioned therein, and does not appear upon the face of it to be the really contracting party. (*p*) But this liability is confined to contracts made by such partner in the execution of the ordinary business of the co-partnership, and for the benefit of the firm at large, as one partner is not of course liable upon the private and particular contracts and engagements of another partner made out of the scope of his ordinary authority, or made by him for his own individual benefit alone, and known by the plaintiff at the time not to be a partnership transaction. (*q*)

The same rule prevails in the French law, "The signature 'and company,'" observes Pothier, "does not oblige my partners, if it appears by the very nature of the contract that it does not concern the affairs of the partnership, as if I have placed that signature at the end of a lease of an estate which belongs to me, and not to the partnership. When the partner has not signed 'and company,' he is deemed to have contracted about his own private affairs, and does not bind his partners, unless the creditor can bring forward evidence to show that he contracted in reality on account of the partnership, and that the contract actually related to the business of the co-partnership." (*r*)

Bills of exchange and promissory notes.—A partner in a mercantile or trading firm may draw, (*s*) accept, (*t*) or indorse (*u*) bills of exchange and promissory notes in the trading name of the firm so as to bind the partnership, because the drawing, accepting, and negotiating bills and notes is usual and necessary for the purpose of carrying on the trade and business of a mercantile firm. "It would be a strange and novel doctrine," observes Lord Ellenborough, "to hold it necessary for a person receiving a bill of exchange, indorsed by one of several partners, to apply to each of the other parties to know whether he has assented to such an indorsement; or otherwise that it should be void. There is no doubt that in the absence of all fraud on the part of the indorsee such indorsement would bind all the partners." (*x*) Every one of the partners, therefore, is liable upon such bills or notes, whether his individual name is or is not used in the collective name of the firm, and whether it does or does not appear upon the face of the instrument, and whether such partner is a dormant and secret, or a known and active member of the co-partnership; and whether the proceeds of such bill or note are dedicated and applied to

(*p*) Ante, 374—376. *Beckham v. Knight*, 1 Sc. N. E. 143. *Trueman v. Loder*, 11 Ad. & E. 594; 2 Smith's Leading Cases, 212.

(*q*) *Bignold v. Waterhouse*, 1 M. & S. 259.

(*r*) *Pothier*, Obl. No. 83.

(*s*) *Pinkney v. Hall*, 1 Baym. 175, Salk.

Baker v. Charlton, 1 Peake, 111.

(*t*) Anon. *Styles*, 370. *Sutton v. Gregory*, 2 Peake, 151.

(*u*) *Swan v. Steele*, 7 East, 210. *Thicknesse v. Bromilow*, 2 Cr. & J. 425.

(*x*) *Swan v. Steele*, 7 East, 212.

partnership purposes, or to the private use of the individual partner. (y)

Thus where one of the acting partners of a firm, in order to obtain a loan of money from a banker, accepted a bill in the name of the firm, and then applied the money to his own private use, it was held that a secret partner, not known at the time of the acceptance to be a partner in the firm, might be sued upon the bill. (z) So where a bill was *indorsed* by a partner in the trading name of the firm, it was held that a person not known to be a partner at the time of the indorsement might be sued upon the instrument. (a) "There is no doubt," observes Lord Ellenborough, "that in the absence of all fraud on the part of the indorsee, such an indorsement would bind all the partners. There may be partnerships where none of the existing partners have their names in the firm. Third persons may not know who they are; and yet they are all bound by the acts of any partners in the name of the firm or partnership." (b) But if the taker or holder thereof knew at the time he received the bill or note that the transaction was not a partnership transaction, but the private affair and dealing of the single partner, the other members of the firm would not of course be liable thereon. (c)

But the bill, or note, in order to bind the partnership, must be made, accepted, or indorsed in the trading name, style, or description of the firm, or in some adopted name, recognized and used by the partnership in its dealings and ordinary course of business; or if made, accepted, or indorsed by the one partner in his own name, the drawing, acceptance, or indorsement must be expressed to be made by him for, and as the act of, the firm at large.

If it appears upon the face of the contract that it is a partnership contract, all the partners are responsible upon it. Thus, where one of two partners in trade made his promissory note in writing, and promised for himself and James Baily, his partner, to pay a sum of money to the plaintiff for value received, and then signed the note in his own name, it was held that the promise for himself and partner to pay the money showed sufficiently that he had signed the note for himself and partner, and that both consequently were liable to be sued thereon. (d) So where a promissory note, signed by a member of a firm in partnership was

(y) Bayley, B., 1 Cr. & J. 318. *Lloyd v. Ashby*, 2 B. & Ad. 23. *Windle v. Crowther*, 1 Cr. & J. 316; 1 Tyr. 216, s. c. *Vere v. Ashby*, 10 B. & C. 288.
(z) *Windle v. Crowther*, 1 Cr. & J. 316; 1 Tyr. 216, s. c.

(a) *Vere v. Ashby*, 10 B. & C. 288.
(b) *Swan v. Steele*, 7 East, 213.
(c) 10 B. & C. 296-298. *Wells v. Masterman*, 2 Esp. 731.
(d) *Smith v. Jarvis and Baily*, 2 Raym. 1484; 11 Mod. 401.

made in the following form :—" Sixty days after date I promise to pay Lord Viscount Galway, or order, 200*l.* value received—For J. Matthew, T. Whit-smith, and T. Smithson.—J. Matthew." It was held that this was the signature of the whole partnership, and that all the members of the firm might be sued upon the note. (e) The partner, in making such a promise, is only an agent for the firm, and he cannot consequently be sued separately thereon. (f)

If a bill, though accepted in the name of one partner only, be addressed to the firm by its trading name, all the partners, whether dormant or not, will be bound by such acceptance. Thus where the trading name of a firm was Rumsey and Co., and a bill was drawn upon them in that name, and was accepted by one of the partners in his own name, by writing across the bill "accepted, T. Rumsey, sen.;" it was held that the firm was liable upon this acceptance. "It would have been enough," observes Lord Ellenborough, "if the word accepted had been written across the bill, and the effect cannot be altered by adding 'T. Rumsey, sen.' If a bill of exchange is drawn upon a firm, and accepted by one of the partners, he must be understood to exercise his power to bind his co-partners, and to accept the bill according to the terms in which it is drawn." (g) So where a bill of exchange was addressed to "James Masterman and Co.," and was accepted by James Masterman only, without the words "and Co.," it was held that the acceptance was the acceptance of the firm, and that all the partners were liable upon it. (h)

If, however, the bill or note is drawn or made, or accepted or indorsed by the one partner in his own name only without mention of the partnership, and without its being expressed on the face of the instrument that the drawing or making, acceptance or indorsement is made or done for the firm, the one partner whose name appears upon the instrument is the only person who can be sued thereon, although the proceeds thereof have been applied to the joint purposes of the firm, unless the partnership has been in the habit of paying bills and notes so made and negotiated, and has consequently adopted the name of the partner as the name of the firm in bill transactions. Thus, where a promissory note appeared on the face of it to be the promissory note of John Walker, it was held that it could not be declared on as the joint note of Walker and Rowlestone, although it was given to secure a debt for which they were jointly liable to the

(e) per Lord Ellenborough, *Galway v. Matthew*, 1 Campb. 402. *Hall v. Smith*, 1 B. & C. 407; 2 D. & R. 584. *Meux v. Humphrey*, 8 T. R. 25.

(f) *Buckley ex parte*, 14 M. & W. 469.

(g) *Mason v. Rumsey*, 1 Campb. 385.

(h) *Wells v. Masterman*, 2 Esp. 730; *Dolman v. Orchard*, 2 C. & P. 104.

promisee, and was intended to be a joint security from both. (i) So where a partner drew a bill of exchange in his own name, to secure the repayment of money advanced for the use and benefit of the firm, it was held that the one partner who had so drawn the bill was the only person who could be sued thereon. (k)

But if the firm carries on business in the name of an individual partner, his acceptance or indorsement will be treated as the acceptance or indorsement of the firm, and all the partners consequently will be liable upon the instrument. (l) Thus, where one of several partners, with the privity of the others, drew bills of exchange in his own name upon the firm in favour of persons who advanced him the amount, which he applied to the use of the partnership, and the firm was in the habit of accepting and paying the bills so drawn, it was held that after the dishonour of one of these bills the members of the firm might be sued for money lent, or money had and received. (m) And a partnership may have divers trading, and adopted names, by the use of any one of which, by any one of the partners, it may be bound. If a firm, in partnership for example, has been in the habit of paying bills and notes, made, accepted, or indorsed in a name which is not the trading name of the co-partnership, it will be deemed to have given an implied authority to such partner to use such name, as the name of the firm, in bill transactions, and will be as much bound thereby as if the ordinary trading name of the firm had been made use of. (n)

If a dormant or secret partner has contracted in the name of the firm, or in an adopted name, he may be sued in his real name, the plaintiff alleging in his declaration that such partner drew, indorsed, or accepted the bill, or made the note in the name of "S. and Co.," or any other name which may be the trading or adopted name of the firm. And whenever a promissory note is drawn, indorsed, or accepted in an adopted name, it should be so expressed, and the name set forth and described in the declaration. (o)

When any one of the partners has accepted a bill of exchange, or indorsed a promissory note in a name differing from the ordinary trading name of the firm, the proper question for the jury is whether the name used, though inaccurate, substantially describes the firm, or whether it so far varies that the acceptor or indorser must be taken to have accepted or issued the bill or note on his own account, and not in the exercise of his

(i) *Siffert v. Walker and Rowlesstone*, 2 Campb. 308.

(k) *Emily v. Lye*, 15 East, 7.

(l) *Ex parte Bolitho*, 1 Buck, 100; *South Carolina Bank v. Case*, 8 B. & C. 436, 437.

(m) *Denton v. Rodie*, 3 Campb. 493.

(n) *Williamson v. Johnson*, 2 D. & R. 281; 1 B. & C. 146.

(o) *Ball v. Gordon*, 9 M. & W. 345. *Tigar v. Gordon*, ib. 347.

general authority as a partner. (*p*) When a partnership was carried on in the name of John Blurton, and one of the partners drew a bill in the name of "John Blurton and Co.," it was held that as the bill was not drawn in the *true* style and name of the partnership, the other partners were not bound thereby. (*q*) "In those cases," observes Alderson, B., "where the question has been left to the jury, it has been whether substantially there was any difference between the signature and the name of the partnership. For instance, if the signature were Coal and Co., and the true designation of the partnership were Cole and Co., it would no doubt be for the jury to say whether it was in substance the same." One partner is not responsible upon bills or notes accepted or made by his co-partners before he became a member of the firm, but if a bill be accepted on account of a debt which was incurred partly before, and partly after such partner joined the firm, he is liable for so much of the debt for which the bill was accepted, as accrued subsequently to his accession to the partnership. (*r*)

If the trading name of the firm, or an adopted or acquired name, is used in dealings and transactions out of the ordinary scope and business of the co-partnership, such a user of the name will not bind the other partners unless they have expressly assented thereto. (*s*) Thus, in the case of professional partnerships where it is not usual or necessary for the purpose of carrying on the trading business of the firm, that bills or notes should be made, accepted, or negotiated, one partner has no implied authority to pledge the name and credit of the co-partnership upon bills and notes. One of two attorneys in partnership made a promissory note in the name of the firm to secure a debt due from the firm to the promisee, and it was held that the other partner, who knew nothing of the note, and had never given his co-partner authority to sign it, could not be made liable upon the instrument. (*t*) One joint tenant of a farm "has no power to bind the others by drawing or accepting bills, because it is not necessary or usual for the purpose of carrying on the farming business that bills should be drawn or accepted. (*u*)

Guarantees.—One of several partners gave a guarantee in the trading name of the firm to secure the payment of a debt of a third party, and it was held by Lord Ellenborough, that there was no implied authority resulting from the mere existence of the copartnership to any one or more of the

(*p*) *Faith v. Richmond*, 11 Ad. & E. 339; 3 P. & D. 187.

(*q*) *Kirk v. Blurton*, 9 M. & W. 289.

(*r*) *Wilson v. Lewis*, 2 Sc. N. R. 118.

(*s*) *Parke, J.*, 10 B. & C. 297; *Hasleham v. Young*, 13 Law J., N. S. (Q. B.) 205.

(*t*) *Hedley v. Bainbridge*, 3 Ad. & E., N. S. 316.

(*u*) *Littledale, J.*, 10 B. & C. 139; *Holroyd, J.*, 7 B. & C. 639; *Bolland, B.*, 2 Cr. & J., 435.

partners to pledge the partnership name for such a purpose. "As it is not usual," he observes, "for merchants to give collateral engagements of this sort, I think you must prove that Lowndes (the partner who signed the instrument) had authority from Bateson (the other partner) to sign the partnership firm to the guarantee in question. It is not incidental to the general power of a partner to bind his copartner by such an instrument."^(x) So where one or two attorneys who were in partnership together, in order to obtain the discharge of a client of the firm from custody, signed the partnership name to an undertaking to pay the debt and costs; in an action which was brought against such client by the plaintiff, it was held that the other partner, who had given no express authority to his colleague to give such an undertaking, could not be sued thereon, as the giving of guarantees and undertakings of such a description was not within the usual course of business of attorneys, and the law, therefore, would raise no inference of any authority from the one partner to bind the other by such an undertaking.^(y)

But if the guarantee refers to a partnership transaction; if it is given to secure the payment of goods supplied or money advanced to the firm, and added to the joint stock of the copartnership, or the performance of something within the ordinary scope and business of the firm, and which one partner generally has power to undertake for on behalf of the firm, it binds all the partners, and all are liable to be sued thereon.^(z) Thus where a workman was employed to work up raw materials and manufacture goods for a partnership, and one of the partners in the firm, in order to procure a supply of such materials to the workman, gave a guarantee to a cotton spinner in the name of the firm for the payment of the price of a quantity of cotton twist, to be furnished to the workmen by the latter, it was considered that all the members of the firm were liable upon such guarantee.^(a)

But if any bill, note, or guarantee, or any other security, given by one partner in the name of the firm, or in its behalf be in truth given by the partner on his own private account or to secure his own private debt, and the party taking such security is aware of that fact, and knows that it is not a partnership transaction, he cannot, of course, enforce it against the partnership. Such a proceeding on the part of the creditor of one partner is a fraudulent attempt to make himself the creditor of the firm. If, there-

(x) *Duncan v. Lowndes*, 3 Campb. 478. *Crawford v. Stirling*, 4 Esp. 209.

(y) *Hasleham v. Young*, 13 Law J., N. S. (Q. B.) 205; 5 Ad. & E. N. S. 833, s. c.

(z) *Ld. Mansfield, Robson v. Cust*, cited 1 East,

53; *Ex parte Nolte*, 2 Gl. & Jas. 306; *Sandilands v. Marsh*, 2 B. & Ald. 679; *Payne v. Ives*, 3 D. & R. 664.

(a) *Ex parte Gardom*, 15 Ves. 286; 2 Hov. sup. 406.

fore, a tradesman supplies wine or porter for the private use and consumption of one of the partners, and with the full knowledge of that fact takes from the latter a bill of exchange accepted by him in the name of the firm by way of payment for the goods so sent, he cannot maintain an action upon this bill against the firm, as he has no right to convert what he knows to be the individual debt of the one partner into a partnership debt. "It is hard enough for one partner, in any case, to be able to bind another without his knowledge or consent, but it would be carrying the liability of partners for each other's acts to a most unjust extent, if we suffered one partner to be bound for a debt incurred by another in this manner." (b)

A creditor of one of the members of a firm in partnership got the latter to give him a guarantee in the name of the firm to secure the payment of his own private and separate debt, and it was held that this guarantee could not be enforced by such creditor as against the copartnership. "There is no doubt," observes Lord Mansfield, "but, that as a general rule, if one partner give a letter of credit or guarantee in the name of all the partners it binds all. But there is no general rule which may not be infected by covin, which is defined to be a contrivance between two to defraud or cheat a third." (c)

*Of the LIABILITY of the COPARTNERSHIP in respect of GOODS SOLD or
MONEY ADVANCED to ONE of the PARTNERS.*

Sales of goods to one of several partners in trade.—A sale of goods and chattels of the same character and description as those ordinarily dealt in by the firm in the exercise of its trade and business to one of the partners who is known by the vendor at the time of the sale to be a member of the copartnership, and is presumed by him to be dealing on account of the firm, is a sale to the firm at large, with whatever view the goods may have been bought by such single partner, and to whatever purposes they may subsequently be applied by him, and all the members of the firm consequently are liable for the payment of the price of them. Thus where one of several partners who were carrying on the business of harness-makers together bought of the plaintiff a number of bits, to be made into bridles which he carried away with him, and instead of taking them to the workshop of the copartnership to be added to the joint stock of the firm, he conveyed them to a pawnbroker's and there pawned them for money for his

(b) *Kenyon, C. J., Shirreff v. Wilks*, 1 East, 51; *Green v. Dakin*, 2 Stark. 347; *Jones v. Yates*, 9 B. & C. 532; *Ridley v. Taylor*, 18

East, 182; *Barber v. Backhouse*, 1 Peake, 86.

(c) *Hope v. Cust*, 1 East, 53.

own private use, it was held, in the absence of evidence showing that the plaintiff at the time of the sale was cognizant of the intended fraud, that the plaintiff was entitled to recover the price from the other members of the firm.(d)

If, however, the vendor knows at the time of the sale that the goods are not ordered and delivered for the use of the partnership, but for the private use of the one partner who gives the order, he cannot of course proceed against the partnership for the price. If, for example, the goods are not of the same character and description as those dealt in by the partnership in the way of its trade, and are not forwarded by the vendor to the place of business of the partnership, but to the private dwelling of the one partner giving the order for his own private use and consumption, the vendor would have no claim against the partnership. "If persons are engaged in the mere business of tallow chandlers as partners, a purchase of a cargo of flour, or of pepper, or coffee, or of other things by one partner wholly beside the business of the firm, would not bind the other partners. But if the articles were such, as might be applied or called for in the ordinary course of their business, the purchase of such articles would bind the firm, even though they were unnecessary at the time, or were bought contrary to the private stipulations between the partners, or were not designed to be used in the partnership at all, if the vendor were not acquainted with the facts."(e)

Whenever goods have been ordered by a person known to the vendor at the time of the sale to be a member of a copartnership engaged in buying and selling, and the goods have not reached the hands of the partnership, but have been appropriated to the private use of the partner ordering them, the question to be asked and answered in order to determine the liability is, to whom was the credit given, to the one partner actually ordering and receiving the goods, or to the firm of which he was known to be a member. If the single partner has been debited in the tradesman's books, and the goods were sold to him on his own private credit, the vendor cannot afterward look to the firm for payment.

A partner cannot, of course, be charged with payment of the price of goods sold and delivered to the copartnership before he became a member of it, but if goods are delivered with his knowledge and assent after he has become a partner pursuant to a previous order or contract for the purchase of them, he then becomes liable with the other partners for the payment of

(d) *Bond v. Gibson*, 1 Campb. 185.

(e) *Story on Partnership*, § 112.

the price of them just as if he had been a partner from the beginning, such subsequent assent being equivalent to a previous authority. *(f)*

Receipt of money by one of several partners.—A receipt of money by one partner for the use, or on account, of the firm, is the receipt of the co-partnership at large, and all the partners are bound thereby, and are individually responsible for the proper application of the money. If, for example, two attorneys are in partnership together as attorneys and conveyancers, and one of them receives a sum of money to be laid out on mortgage, the other is responsible for the proper application of the money, although the party receiving it gives his own separate receipt for it, making himself individually accountable for the amount on demand. *(g)* And if one of several partners in trade obtains money in the ordinary course of dealing of the co-partnership, but by means of false and fraudulent representations, and converts the money when received to his own use in fraud of his partners, the partnership is nevertheless responsible for the monies so received in the name of the firm, and an innocent partner may consequently be as much bound by such fraudulent acts and transactions as if he himself had personally been a party to them. *(h)* But if the fraud has not been committed in the course of the partnership dealings, but in the private and separate transactions of the single partner himself with third parties, the innocent partners cannot of course be made responsible to those who have been defrauded in the course of such transactions. Thus, if a partner who holds money in his hands as a trustee for third parties brings that money into the partnership account, and employs it in the business as his own money, the other partners cannot be made responsible for the repayment of the money so employed in the business, *(i)* unless they knew at the time that the money was trust money, the property of third parties, and not the property of their co-partner. *(k)*

Loans of money to one of several partners.—In an action against a firm in partnership for the recovery of the sum of 10*l.*, alleged to have been advanced to the firm, it appeared that the plaintiff was in the habit of dealing with the firm in the way of their trade, and that one of the partners who was travelling for orders and also to make purchases for the firm, called upon the plaintiff in the country, and after transacting busi-

(f) *Saville v. Robertson*, 4 T. R. 725. *Pinder v. Wilks*, 5 Taunt. 613.

(g) *Willett v. Chambers*, 2 Cowp. 814. — *v. Layfield*, 1 Salk. 292, pl. 33.

(h) *Rapp v. Latham*, 2 B. & Ald. 795. *Stone v. Marsh*, Ry. & Mood. 368; 6 B. & C.

551. *Keating v. Marsh*, 1 Mont. & Ayr. 582. *Hume v. Bolland*, Ry. & Mood. 371.

(i) *Ex parte Apsey*, 3 Br. 265. *Jaques v. Marquand*, Cowen U. S. R. 497.

(k) *Ex parte Heaton*, Buck. 386. *Smith v. Jameson*, 5 T. R. 601.

ness on account of the firm, borrowed 10*l*. of him in the name of the co-partnership to defray his, the said partner's, travelling expenses back to London, and the plaintiff having brought his action against the firm for the recovery of the money so lent, it was contended that this was a loan of money for the private use of the partner and not a loan to the firm at large, but Lord Kenyon told the jury that "though the loan of the money was to one of the partners, it was lent to him while employed on the partnership business, and on its account; and that being the case, it was competent to him to bind the partnership to the payment of the debt," and the plaintiff accordingly obtained a verdict. (*l*)

But if a partner professes to borrow money for the firm, and misapplies it, and there be proof that the plaintiff lent it under circumstances of negligence and out of the ordinary course of business, he cannot recover the amount from the other partners. (*m*) And "it is not enough to prove that money borrowed by an individual partner goes into the partnership estate to make the partners liable." (*n*) If money is lent on the individual credit of one partner alone, the firm at large cannot be charged with the repayment of it, although it may in fact be subsequently applied to the use of the partnership. (*o*) Thus where one partner was in the habit of drawing bills in his own name, and getting them discounted by the plaintiff, and using the proceeds of such bills in the business of the firm, and applying them to the general purposes of the partnership, it was held that the plaintiff could not treat the money advanced by way of discount on the bills accepted by the partner in his own name only as a loan to the firm. "It is contended," observes Lord Ellenborough, "that as the proceeds went to the use of the partnership, the partners are therefore liable. I am at a loss to discover what difference that circumstance can make if it were originally a mere matter of discount; and I do not find any evidence to show that it was anything else. It was supposed, indeed, by the plaintiff that the money would be applied to the partnership use, and to such use it was in fact applied; but nothing passed from the defendants to induce him to believe that it was a partnership concern, and to lend his money on that account. It does not appear that anything more took place than the mere discount of the bills, and it would be highly dangerous to follow the proceeds into the hands of every party to whose use they may be applied. If the bills had been void, as, for instance, if they had been forgeries, that might have made

(*l*) *Rothwell v. Humphreys*, 1 Esp. 405.

(*m*) *Lloyd v. Freshfield*, 2 C. & P. 325; 9 D. & R. 19, s. c. *Ex parte Agace*, 2 Cox, 312.

(*n*) *Ex parte Emly*, 1 Rose, 65.

(*o*) Per Abbot, C. J., *Lloyd v. Freshfield*, 9 D. & R. 19. *Bevan v. Lewis*, 1 Sim. 376.

a different case, because then no consideration would have passed to the person discounting; but here a good consideration was given for the discount, namely, the responsibility of the drawer of the bills." (p)

But where the member of a partnership was in the habit of drawing bills in his own name upon the firm, and getting them discounted, and applying the proceeds to the general purposes of the partnership, and the firm regularly accepted and paid the bills so drawn until it became bankrupt, it was held that the members of the firm must be taken to have given their co-partner authority to raise money for the use of the firm upon the bills in question, and that the money advanced by way of discount upon them might be treated as a loan to the partnership. (q)

Representations and acknowledgments.—All admissions, representations, and acknowledgments also, touching the partnership business and dealings made by one of the partners, will bind all the members of the firm as between themselves and third parties who have acted upon the faith of such representations and statements. (r)

LIABILITIES *of* DORMANT *and* SECRET PARTNERS *to* THIRD PARTIES.

We have already seen that if a man appoints an agent, and contracts in the name of such agent, secretly reserving to himself the benefit of the transaction, he is personally liable as the principal and really contracting party as soon as his true situation and character are discovered by the person who has dealt with the agent. Any person, therefore, who secretly connects himself with a firm in partnership furnishing capital, labour, or skill, and secretly receiving or reserving to himself a participation in the profits of the business, stands in the position of an undisclosed principal who has contracted in the name of an agent, and is liable in common with the acting and ostensible partners for the performance of the contracts and the satisfaction of the debts and liabilities of the co-partnership upon the oft-repeated maxim *qui sentit commodum sentire debet et onus*. (s) It is said, moreover, as a further ground and reason for his liability, that he who takes a part of the profits takes from the creditors of the partnership part of that fund which is the proper security to them for the payment of their debts, and ought, therefore, to be made liable for the losses

(p) *Emly v. Lye*, 15 East, 11. *Smith v. Craven*, 1 Cr. & J. 500.

(q) *Denton v. Rodie*, 8 Campb. 493. *Ex parte Bolitho*, Buck. 100. *Ex parte Bonbonus*, 8 Ves. 542.

(r) *Rapp v. Latham*, 2 B. & Ald. 801. *Lucas v. De la Cour*, 1 M. & S. 249.

(s) *Grace v. Smith*, 2 W. Bl. 998. *Pell v. Brooke*, cited ib. 999.

if losses arise. (t) All dormant and secret partners, therefore, whose names do not appear to the world may be made responsible for the engagements of a firm of which they are members, although the parties who sue them were ignorant of their existence at the time they contracted with the partnership. (u) If a person, although professing to be a mere servant or agent of a co-partnership, and appearing only in that character, secretly contributes to the capital and joint stock of the co-partnership, and has a secret interest as a principal in the concern, he is responsible as a dormant partner, and cannot of course be set up as a defence that he is a mere hired servant or agent.

There is, however, an important distinction to be attended to as regards the liability of a secret partner upon bills of exchange, promissory notes, and agreements *inter partes*. In the case of bills and notes, the dormant partner cannot be made liable, as we have already seen, unless the name upon the face of the instrument is the trading name of the firm, or a name adopted and used by the firm at large in bill transactions. But in the case of simple contracts *inter partes*, the secret partner may be sued, although the contract is made in the name of one only of the partners, and the firm has not previously recognized any contracts made in his name alone as partnership contracts. (x) Thus where an agreement was entered into between W. M. Knight and J. Surgey, co-partners, of the one part, and D. Beckham of the other part, whereby Beckham agreed to serve Knight and Surgey and the survivor of them as foreman in their trade of type-founders for the term of seven years, and they agreed to employ him for the same term, and to pay him three guineas a week wages, and Beckham entered into the service of the co-partnership, and was employed as foreman, but was wrongfully dismissed from the service before the expiration of the seven years, it was held that he was entitled to sue DRAKE, a secret partner in the said co-partnership, together with Knight and Surgey, for a breach of the agreement, although it was unknown to Beckham that DRAKE was a partner at the time of the making of the contract, and the name of the latter did not anywhere appear upon the face of the written instrument. "I agree," observes Parke, B., "that inasmuch as the defendant Drake has not subscribed this instrument with his own hand, it must be made out that he is a party to it in point of law, and that he authorized Knight and Surgey to sign

(t) De Grey, C. J., *Grace v. Smith*, 2 W. Bl. 1001. Eyre, C. J., *Waugh v. Carver*, 2 H. Bl. 248; 1 Smith's Leading Cases, 502, 503. *Hoare v. Davies*, 1 Doug. 372.

(u) *Gellar v. Hutchinson*, 1 Rose, 297.

Windle v. Crowther, 1 Cr. & J. 316. *Robinson v. Wilkinson*, 3 Pr. 538. *Ex parte Chuck*, 1 M. & Sc. 616, 617.

(x) *Beckham v. Drake*, 9 M. & W. 94, 96; ante, 259, 260.

it on his behalf. I think that this is shown by the fact of his being a partner in the trade and sharing the profits of it. Being a dormant partner, he authorizes the ostensible partners to enter into such contracts as are usually entered into in the course of such a business. . . . If the plaintiff entered into the contract in ignorance of Drake being a real partner, the case would be within the same principle of law which applies to the introduction of a principal before unknown, where the party who contracted upon the supposition that the agent was the principal, is entitled to all the same benefits and rights, and stands precisely in the same situation, as he would have been if he had been aware of the real principal. For all questions between partners are no more than illustrations of the same questions as between principal and agent." (y)

The liability of persons who have participated as principals in the joint speculations and contingent profits of a partnership, or joint adventure, cannot in any way be controlled or affected by the secret contracts of the joint adventurers *inter se*. If, therefore, the joint adventurers expressly agree not to be partners *inter se*, such an agreement cannot in any way affect their position as regards the public. (z) If several partners or joint adventurers in a particular trade or business agree that the trade shall be carried on by one or more of them in their own names as the ostensible and acting partners, and that certain secret partners who contribute capital, skill, or labour to the joint stock of the partnership, shall not be liable for losses beyond a certain amount, the operation of the agreement is confined to those who were parties to it, and cannot affect the liability of such secret partners *quoad* the public and third persons ignorant of the private stipulations and arrangements of the firm. (a)

And it matters not whether the party participates in and receives or bargains for a share in the accruing profits for his own benefit, or as a trustee or executor for others. (b) Equally indifferent is it whether his share be large or small. (c)

But the mere existence of a secret partnership in the subsequent disposition of goods purchased by one partner on his own individual credit, and not on the credit of the co-partnership, will not render the secret partner liable for the payment or the price of them. Thus where three parties agreed to bring out and publish a periodical called the Sporting

(y) *Beckham v. Drake*, 9 M. & W. 97, 98.
Drake v. Beckham, 11 M. & W. 316, 317.

(z) *Waugh v. Carver*, 2 H. Bl. 235. *Hesketh v. Blanchard*, 4 East, 144. *Smith v. Watson*, 2 B. & C. 401.

(a) *Ex parte Langdale*, 18 Ves. 300. *Geddes*

v. Wallace, 2 Bligh, 270. *Gilpin v. Enderbey*, 5 B. & Ald. 954. *Bond v. Pittard*, 3 M. & W. 357.

(b) *Wightman v. Towns*, 1 M. & S. 412.
Ex parte Garland, 10 Ves. 119, 120.

(c) 9 East, 527.

Review on their joint account, upon the terms that one of them, who was an author, was to write the book, and furnish manuscript and drawings, and another, who was a printer, was to furnish the paper for the work and charge it to the account at cost price, and was also to charge the printing at "master's prices," and the third, who was a publisher, was to publish the work, make and receive general payments, keep the accounts, and divide the profits between the three, and the printer ordered paper for the work, but became bankrupt before he had paid for it, whereupon the stationer sought to recover the price from the other two partners, it was held that they were not liable for the payment of it, as it was bought upon the individual credit of the printer. "The question is," observes Parke, B., "did the other defendants authorize Whitehead (the printer) to purchase the paper on their account or on his own. It appears to me, on the true construction of the contract, that the latter was the case. This is very much like the case of coach proprietors, where each horses the coach for one or more stages, and each agrees to bring into the concern the work and labour of his horses, and none of the others has any interest in them, though all share the profits." (d)

Where, however, a publisher gave an order to a stationer to deliver to the defendant, who was a printer, "two hundred reams of super-royal paper for Jeremy Taylor's works, and seventy-two reams for Doddridge's Expositor," and the paper was delivered at the printer's office, and it was afterwards discovered that the printer was at the time of the giving of the order a partner with the publisher in both the works mentioned in the order, it was held that he was liable, together with the publisher, for the price of the paper. "I can conceive," observes Lord Denman, "that all the partners may not be liable for all that is done by each individual partner, but I think that in such cases there should be something exclusive in the nature of the transaction, not only that they should not be known, but that the ordering of the goods should be the exclusive act of the particular partner." (e)

Generally speaking, when several persons agree to be jointly interested in the disposal of certain goods when purchased, so as to constitute themselves partners in the transaction, and the goods are obtained for the joint use and benefit of all of them, they are all responsible for the whole bargain as the real principals in the transaction, so that the full value of the goods may be recovered from any one of them, although they were purchased on the credit of the ostensible buyer alone. If, indeed, the

(d) *Wilson v. Whitehead*, 10 M. & W. 503.

(e) *Gardiner v. Childs*, 8 C. & P. 345, 351.

parties are not jointly interested in the disposal of the goods when purchased, and are not trading with them as partners on their joint account, then they cannot be sued jointly for them, and one cannot, as we have already seen, be made to pay the price of the whole, but each is separately responsible for his own separate share only of the things so bought.

Several persons employed a broker to purchase tea for them at the India House, and furnished him with money to make the usual deposits on the purchase. The tea was bought in one lot, to be subsequently divided between the parties in separate shares, but before the transaction was completed, most of the parties who had joined in the purchase died or became bankrupt, and two of them were sought to be made responsible for the full price of the tea, on the ground that they were all secret partners, and jointly and severally liable in respect of the entire lot of tea purchased, as well as of their individual shares; but the court held that there was no partnership at all between the parties who had employed the broker, and that the defendants were severally liable only to the amount of their separate shares. "At first," observes Lord Mansfield, "I considered this as a case of dormant partners. The law with respect to them is not disputed, viz., that they are liable when discovered, but towards the end of the cause the nature of the transaction was more clearly explained. . . . Is this a partnership between the buyers? I think it is not, but merely an undertaking with the broker by each for a particular quantity. There is no undertaking by one man to advance money for another, nor any agreement to share with one another in the profit or loss. It would be most dangerous if a person who engages for a fortieth part, for instance, should be considered bound for all the other thirty-nine parts. *Non hæc in fœdera veni.*"(f)

Three persons agreed amongst themselves to purchase jointly a quantity of oil on speculation. Eyre, one of their number, was to go into the market and be the ostensible buyer, and the others were to share in the purchase at the same price which he might give. Eyre accordingly bought the oil but never paid for it, and it was held that the other two persons could not be sued jointly with him as his secret partner in the transaction; that the agreement was a subcontract to share severally in certain proportions in the purchase to be made by the ostensible buyer on his own credit, and that the failure of such buyer to pay the price did not render the two other subcontractors responsible for the price of the whole bargain.(g)

(f) *Hoare v. Dawes*, 1 Doug. 372.

(g) *Coope v. Eyre*, 1 H. Bl. 37.

LIABILITIES *of* NOMINAL PARTNERS *to the* CREDITORS *of the* FIRM.

Nominal partners.—Persons may become clothed with the legal liabilities and responsibilities of partners as regards the public and third parties, by holding themselves out to the world as partners as well as by contracting the legal relationship of partners *inter se*. If the question of partnership were between A. and B. whether they were partners or not, it would be very well to inquire whether they had contributed, and in what proportions, stock or labour, and on what agreements they were to divide the profits of the contribution. But when the question is not between the parties themselves as to what shares they shall divide, but respecting creditors claiming a satisfaction out of the funds of a particular house as to who shall be deemed liable in regard to those funds, the sense or understanding of the parties themselves *inter se* that they shall not be partners; that A. shall contribute neither labour nor money nor receive profits will be of no avail and will not affect the existence of the partnership so far as regards the public at large. “If a man will lend his name as a partner, he becomes as against all the rest of the world a partner, not upon the ground of the real transaction between them, but upon principles of general policy to prevent the frauds to which creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them.”(h)

If a man, therefore, allows himself to be published to the world as a member of a particular firm, if he permits his name to appear in the partnership name, or to be used in the business, if he suffers it to be exhibited to the public over a shop window, or to be written or printed in invoices, or bills of parcels or prospectuses, or to be published in advertisements as the name of a member of the firm, he is an ostensible partner and is chargeable as a partner, although he is not in point of fact a partner in the concern, and has no share or interest in the profits of the business. Thus where a merchant, carrying on trade on his own separate account, introduced into his firm the name of a clerk who had no participation in the profits, but continued to receive a fixed salary as clerk, it was held, as regarded the public and third parties ignorant of the private arrangement, that the clerk must be taken to be a member of the firm. “He is to be considered,” observes Lord Ellenborough, “in all respects a partner as between himself and the rest of the world.”(i)

But if a man is sought to be charged as a partner by reason of his hav-

(A) Eyre, C. J.; *Waugh v. Carver*, 2 H. Bl. 246; 1 Smith, 502, 503.

(i) *Guidon v. Robson*, 2 Campb. 304.

ing permitted his name to appear in printed papers, prospectuses, or advertisements, it must appear that the partnership was actually formed and in operation, and was not merely a projected joint adventure. If he has merely signed his name to a prospectus and advertisement, intimating that he is about to become a partner, or that a partnership or company is about to be formed on certain conditions, and on the happening of certain events, he does not thereby hold himself out to the world as an actual partner in an existing partnership, and cannot be made liable as such unless he does some further act actually constituting him a partner. (k)

If a person holds himself out to the world as a partner with another in a particular line of business only, he does not thereby render himself liable as a partner in other transactions not within the ordinary and reputed course of business of the partnership to which he professes to belong. (l) And, if a plaintiff has contracted with a firm in partnership, knowing at the time that the defendant, whose name appeared in the name of the firm as an ostensible partner, was not in fact a partner, and had no share or interest in the partnership, he cannot afterwards make the defendant responsible upon the contract which he entered into with notice of that fact. (m)

If a man's name is used without his knowledge and consent, and he is represented by others to be a partner without his authority or permission, he cannot of course be made responsible as a partner upon the strength of such false and fraudulent representation. (n) "The holding oneself out to the world as a partner, as contradistinguished from the actual relation of partnership, imports at least the voluntary act of the party so holding himself out. It implies the lending of his name to the partnership, and is altogether incompatible with the want of knowledge that his name has been so used. Thus, in the ordinary instances of its occurrence, where a person allows his name to remain in a firm, either exposed to the public over a door, or to be used in printed invoices, or bills of parcels, or to be published in advertisements, the knowledge of the party that his name is used, and his assent thereto, are the very grounds upon which he is estopped from disputing his liability as a partner." (o)

Although a man's name may not have been used in the partnership business, and he may not consequently be known to the public as an ostensible partner, yet if he privately represents or states himself to be a partner, and goods are furnished, or credit given to the firm upon the

(k) *Bourne v. Freeth*, 9 B. & C. 640, 641.

(l) *De Berkom v. Smith*, 1 Esp. 29.

(m) *Alderson v. Pope*, 1 Camp. 403, 404, n.

(n) *Newsome v. Coles*, 2 Campb. 617.

(o) *Tindal, C. J.; Fox v. Clifton*, 4 M. & P. 713, 714.

faith of such statements and representations, he is responsible, although they are untrue, and he is not in point of fact a partner. A man may be fixed with the liabilities and responsibilities of a partner through the medium of his own express admissions or representations, or by acts and dealings calculated to induce customers and others contracting with the firm to believe him to be a partner.(p) "If it can be proved that the defendant had held himself out to be a partner 'not to the world,' for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it, and believed him to be a partner, he will be liable to the plaintiff in all transactions in which he engaged, and gave credit to the defendant or to the partnership, upon the faith of his being such a partner."(q) "Though in point of fact parties are not partners in trade, yet if one so represents himself, and by that means gets credit for goods for the other, both shall be liable."(r)

But in order to fix a defendant with the liability of a partner upon the strength of his own private statements and admissions,(s) not known or made notorious to the world at large, the plaintiff must, if the defendant shows that such statements and representations were untrue, and that he was not in fact a partner, and had no interest in the concern,(t) prove that he knew of, and acted upon such statements and representations, and dealt with, and credited the firm, under the belief that they were true;(u) for if the plaintiff was, at the time, ignorant of them, and did not know that the defendant had represented himself to be a partner, he cannot pretend to say that he gave credit to the partnership upon the faith of the defendant's name and responsibility as a member of the firm.(u) In order to charge a man for the contracts, debts, and liabilities of a copartnership, on the ground of his being a reputed member of the firm, "it is necessary that he should have been known as a member of the firm to the plaintiffs, either by direct transactions or public notoriety."(x) No mistaken supposition of a party as to his being a partner, will make him liable as such, unless it were communicated to the plaintiff so as to mislead him.(y) It has been thought, indeed, that even where the defendant has publicly holden himself out to the world as a partner, he is not liable, if the party

(p) *Ld. Kenyon*, 1 *Rep.* 31. *Spencer v. Billing*, 3 *Camp.* 310. *Parker v. Barker*, 3 *Moore*, 228; 1 *B. & B.* 9, s.c. *Ridgway v. Broadhurst*, 5 *Tyr.* 133.

(q) *Parke, J.*, *Dickenson v. Valpy*, 10 *B. & C.* 140.

(r) *Ld. Kenyon*, 1 *Rep.* 30, 31; *Ld. Tenterden*, 10 *B. & C.* 21.

(s) *Ralph v. Harvey*, 1 *Ad. & E.* n. s. 845.

(t) *Glossop v. Coleman*, 1 *Stark.* 25. *Ridgway v. Philip*, 1 *C. M. & R.* 417.

(u) *Holcroft v. Hoggins*, 15 *Law, J.*, n. s. (C. P.) 129.

(x) *Carter v. Whalley*, 1 *B. & Ad.* 13, 14.

(y) *Ld. Tenterden*, C. J., *Vice v. Lady Anson*, 1 *M. & M.* 99; 7 *B. & C.* 411, 413, s.c.

seeking to charge him did not know at the time when he gave credit to the firm that he has so holden himself out, as it cannot be said (it is contended) that the contract was made with the firm upon the credit of his name, and upon the strength of his apparent responsibility, if the person dealing with the firm, and seeking to charge him, had never heard of him as a component part of it.(z) It may be observed, however, that if a man of wealth and substance allows himself to appear publicly as a partner, he thereby adds to the credit and stability, and the general character and reputation of the copartnership in the commercial world. And all who rely upon the credit of the firm, and its reputed stability, do in fact rely upon the individual credit of each of the reputed and ostensible partners, although they may have no personal knowledge of any one of them.(a)

Of the extent and duration of the liability of partners—Dissolution of the partnership as regards the public or third parties.—"If once a person holds himself out as being a partner, till he gives notice that he has ceased to be so, those who deal with the firm upon the faith of the supposed partnership, may consider him as such, and he is bound by that representation."(b)

The retirement of an ostensible partner ought to be made as notorious as the fact of his connexion with the firm. A notice in the *London Gazette* is insufficient,(c) unless there is a reasonable presumption that the paper has been seen and read by the parties dealing with the firm.(d) "Many people there are in this kingdom who never see a gazette to the day of their deaths, and very mischievous would be the consequences if they were bound by a notice inserted in it."(e) And even if the advertisement is inserted in a paper which a plaintiff who is suing a retired partner is in the habit of reading, the insertion, unless it has been frequently repeated, is of itself very meagre evidence of the plaintiff's knowledge of the fact.(f)

The only certain and secure way of putting an end to the continuing liability, is to insert frequent advertisements of the retirement of the partner in all the papers having the greatest circulation in the immediate neighbourhood of the place where the business of the copartnership is carried on, and to send express notice to every person residing at a dis-

(z) Smith's lead. cas. 507, in notis.

(a) *Young v. Axtell*, cited 2 H. Bl. 242; 1 Smith, 498, 499.

(b) *Abbott, C. J., Goode v. Harrison*, 5 B. & Ald. 157. *Doubleday v. Musket*, 7 Bing. 116.

(c) *Leeson v. Holt*, 1 Stark. 186. *Godfrey v.*

Macaulay, Peake, 209, n.

(d) *Lord Galway v. Mathew*, 1 Campb. 403.

(e) *Ld. Kenyon, Graham v. Hope*, Peake, 208.

(f) *Jenkins v. Blizard*, 1 Stark. 420.

tance who has been in the habit of dealing with the partnership during the time that the retiring partner was a member of the firm.(g)

DORMANT *and* SECRET PARTNERS may release themselves from all further liability by a simple relinquishment of their share in the profit and loss of the business. They continue responsible upon all executory contracts and transactions in actual operation at the time of their withdrawal, but they are not liable upon the subsequent contracts of the firm, and the debts and liabilities incurred after their retirement.(h) But if they are not strictly *secret* as well as dormant partners, notice of the termination of their connexion with the copartnership must be given. In a recent case, where an action had been brought against a dormant partner upon certain partnership contracts entered into long after he had withdrawn from the partnership, the law upon the subject was thus laid down by Cresswell, J. : " The defendant was once in the partnership, but he has not been so since the year 1837. The plaintiff dealt with the firm during the partnership, and he continued to do so afterwards ; and the question is, whether the defendant is liable in respect of such subsequent dealings, now that the partnership is dissolved. The law stands thus : if there had been a notorious partnership, but no notice had been given of the dissolution thereof, the defendant would have been liable. If there had been a general notice, that would have been sufficient for all but actual customers ; these, however, must have had some kind of actual notice. If the partnership had remained profoundly secret, the defendant could not have been affected by transactions which took place after he had retired ; but if the partnership had become known to any person or persons, he would be in the same situation as to all such persons, as if the existence of the partnership had been notorious. The question, therefore, is, was this partnership actually known to the plaintiff either by general report or direct communication ? Because, if it were, and he did not know either from notice of the fact or from surmise, that the dissolution had taken place, you must infer that he still dealt on the faith of the partnership, and the defendant will therefore be liable.(i)

(g) *M'Iver v. Humble*, 16 East, 169. *Newsome v. Coles*, 2 Campb. 617. *Hart v. Alexander*, 2 M. & W. 490. *Barfoot v. Goodall*, 3 Campb. 148. *Lacy v. Woolcott*, 2 D. & R.

460.

(h) *Evans v. Drummond*, 4 Esp. 88. *Carter v. Whalley*, 1 B. & Ad. 11.

(i) *Farrar v. Deftinne*, 1 C. & K. 580.

CHAPTER XIX.

JOINT STOCK COMPANIES.

SECTION I.—*Projected and Provisionally-registered Joint Stock Companies.*—Distinction between a joint stock company and an ordinary partnership—Joint stock companies and associations excepted from the operation of the Joint Stock Companies' Act—Of the formation and establishment of joint stock companies—Penalties for non-registration—Penalties for advertising companies and receiving money on allotments and promises of shares before provisional registration—Effect of provisional registration—Penalties on transfers of shares *after* provisional and *before* complete registration—Transfers of shares in railway and parliamentary works' companies not within this section—Liabilities of the members of the committee of management *inter se*—Contribution between them—Liabilities as between the committee of management on the one hand, and the subscribers and shareholders on the other—Payment of subscriptions and deposits—Of the right to a return thereof on the abandonment of the undertaking—Liabilities of the members of the committee of management, provisional committeemen, and subscribers and shareholders, to third parties.

SECTION II.—Completely registered joint stock companies—Preliminaries to complete registration—Effect of complete registration—Formation and establishment of bye-laws—Of the keeping of accounts, and of the division of profits—Sales and transfers of shares—Liabilities of individual shareholders to the company, and of the company to the shareholders individually—Liability of the shareholders on calls—Pecuniary qualification of directors—Power of the directors to bind the company—Contracts under seal—Bills of exchange and promissory notes—Execution against the present and former shareholders of judgments recovered against the company—Contribution between present and former shareholders *inter se*.

SECTION III.—*Of the annual and general returns, annual registration and dissolution of joint stock companies.*—Returns of changes and alterations in the deed of settlement, and of changes amongst the shareholders—Acts of bankruptcy by joint stock companies—Of the winding up of the affairs, and of the dissolution of joint stock companies.

SECTION I.

PROJECTED AND PROVISIONALLY REGISTERED JOINT STOCK COMPANIES.

Of the distinction between a JOINT STOCK COMPANY and an ordinary PARTNERSHIP.—By 7 and 8 Vict. c. 110, s. 2, it is enacted, “that the term joint stock company shall comprehend every partnership whereof the

capital is divided, or agreed to be divided, into SHARES, and so as to be transferable without the express consent of all the copartners," or " which at its formation, or by subsequent admission, (except any admission subsequent on devolution or other act in law,) shall consist of more than SEVENTY-FIVE MEMBERS; and also every assurance company, or association for the purpose of assurance or insurance on lives, or against any contingency involving the duration of human life, or against the risk of loss or damage by fire, or by storm, or other casualty, or against the risk of loss or damage to ships at sea or on voyage, or to their cargoes; or for granting or purchasing annuities on lives; and also every institution enrolled under any of the acts of Parliament relating to friendly societies; which institution shall make assurances on lives, or against any contingency involving the duration of human life to an extent upon one life, or for any one person, to an amount exceeding 200*l.*, whether such companies, societies, or institutions, shall be joint stock companies, or mutual assurance societies, or both. And it is enacted, that the act shall apply to every joint stock company as therein defined, established in any part of Great Britain or Ireland, excepting Scotland, or established in Scotland, and having an office or place of business in any other part of the united kingdom, for commercial purposes or purposes of profit, or for the purpose of assurance or insurance, with the following exceptions:—

Joint stock companies and associations excepted from the operation of the Joint Stock Companies Act.—Banking companies, schools, scientific and literary institutions, friendly societies, loan societies, and benefit building societies, duly certified and enrolled under the statutes in force respecting such societies, (other than such friendly societies as grant assurances on lives to the extent of 200*l.* on any one life, or against any contingency involving the duration of human life, as previously mentioned,) are expressly excepted (s. 2) from the operation of the Joint Stock Companies Act. Also (s. 63) all partnerships formed for the working of mines, minerals, or quarries, on the principle commonly called the cost book principle; and (s. 64) certain partnerships in Ireland, commonly called "anonymous partnerships," formed under the Irish stat. 21 and 22 Geo. 3, c. 46; and also all partnerships formed after the first day of November, 1844, except where the provisions of the act are expressly applied to partnerships existing before that date; and all companies for executing any bridge, road, cut, canal, reservoir, aqueduct, waterwork, navigation tunnel, archway, railway, pier, port, harbour, ferry, or dock, which cannot be carried into execution without the authority of parliament, except as in the act is specially provided concerning the

same; and all companies incorporated, or which may be incorporated by statute or charter, or authorized, or which may be authorized, by statute or letters patent, to sue and be sued in the name of some officer or person, except as in the act is specially provided, of and concerning such companies.

Of the formation and establishment of joint stock companies.—Before proceeding to make public, whether by way of prospectus, hand-bill, or advertisement, any intention or proposal to form an association or partnership coming within the legislative definition of a joint stock company, whether it be an association or company for the execution of any work under the authority of parliament, or for any other purpose, the promoters must make a return (s. 4) to the registrar of joint-stock companies, of the proposed NAME of the intended company, the BUSINESS or purpose of the company, and the NAMES of the PROMOTERS, together with their respective occupations, places of business, (if any,) and places of residence, and upon the return and registration of these three particulars the promoters are entitled to a CERTIFICATE of PROVISIONAL REGISTRATION.

PENALTIES for non-registration and the non-transmission of the returns required by the statute.—A penalty of 20*l.*, to be recovered in the mode pointed out in the statute, (ss. 69—72,) is imposed by the fifth section upon the promoters of any such company who fail to register the name and purpose of the company, and the names and occupations and places of business and residence of such promoters as previously specified for a period of one month after they have been ascertained and determined, and also the following further particulars when and as they shall be decided on, viz., the name of the street, square, or place in which the provisional place of business or place of meeting is situate, and the number or other designation of the house or office, the names of the members of the committee or other body acting in the formation of the company, their respective occupations, places of business, (if any,) and places of residence, together with a written consent on the part of every such member or promoter to become such, and also a written agreement on the part of such member or promoter entered into with some one or more persons as trustees for the company to take one or more shares in the proposed undertaking, which must be signed by the member or promoter whose agreement it purports to be (but such agreements need not be stamped). Also the names of the officers, and of the subscribers of the company, with their respective occupations, places of business, (if any,) and places of residence—a copy of every prospectus or circular, hand-bill, advertisement, or other such document at any time addressed to the pub-

lic, or to the subscribers or others, relative to the formation or modification of such company—and afterwards from time to time, until the complete registration of such company, a return of a copy of every addition to or change made in any of the above particulars.

Transfer of penalties from the PROMOTERS to the SOLICITOR.—If the promoters (s. 61) appoint a person, being an attorney or solicitor of one of her Majesty's superior courts of law or equity, to be solicitor for the promoters of such company, and return to the registry office a duplicate of the appointment in writing, signed by some one or more of the promoters, together with a duplicate of the acceptance of such appointment, signed by the person so appointed, then until a duplicate of the revocation, or of the resignation of such appointment, be returned in like manner so signed, or until the decease of such solicitor, all returns required to be made by the promoters, are to be made by the solicitor in their behalf, and the solicitor is made liable to the penalty instead of the promoters for neglecting to make the required return, and if he fraudulently omits to make the return, he is liable to be suspended from practice or struck off the rolls.

PENALTIES for advertising the company or taking money on allotments or promises of shares, and for making contracts before provisional registration.—A penalty of 25*l.* is imposed (s. 24) upon the promoters, and upon all persons employed by them for taking money or deposits on the allotment of shares, or of any interest in the concern, or on scrip, or letters of allotment, or promises of shares, or who advertise the existence or proposed formation of the company, or make any contract in the name or on behalf of the proposed company before a *certificate of* PROVISIONAL REGISTRATION shall have been obtained.

PENALTIES for the non-registration of joint stock companies existing on the 1st of November, 1844.—All joint stock companies coming within the definition and operation of the Joint Stock Companies Act, which shall have existed on the 1st of November, 1844, whether incorporated by act of parliament, or charter, or privileged by letters patent, or established by deed of settlement, or in any other way whatever, must be provisionally registered; (s. 58.) and the directors and managers of such companies are liable to a penalty of 50*l.* if they have failed to make to the register office the returns required by the 58th section of the statute, and to register the company provisionally.

EFFECT OF PROVISIONAL REGISTRATION.

As soon as the provisional registration of the company has been

certified by the registrar, the promoters are entitled to act provisionally for the space of twelve months from the date of the certificate, but not for any longer period, unless the certificate is renewed, which may be done on application for that purpose, but no such renewed certificate is to be in force for a longer period than twelve months from the date thereof; and it is enacted (s. 23) that in acting provisionally, it shall be lawful for the promoters of such company, to assume the name of the intended company, but coupled with the words "registered provisionally;"—to open subscription lists—to allot shares—to receive deposits, by way of earnest thereon, at a rate not exceeding ten shillings for every 100*l.* on the amount of every share in the capital of the intended company; and also, in the case of companies for executing any bridge, road, cut, canal, reservoir, aqueduct, water-work, navigation, tunnel, archway, railway, pier, port, harbour, ferry or dock, which cannot be carried into execution without the authority of parliament, in addition to and exclusive of such sum of ten shillings per hundred pounds, such further sum per hundred pounds on the amount of every such share as may be required by the standing orders of either house of parliament, to be deposited before the obtaining of an act of parliament for enabling the company to execute such work; and also to perform such other acts only as are necessary for constituting the company, or for obtaining letters patent, or a charter, or an act of parliament; but not to make calls, nor to purchase, contract for or hold lands, nor to enter into contracts for any services, or for the execution of any works, or for the supply of any stores, except such services and stores, or other things as are necessarily required for the establishing of the company; and except any purchase or other contract be made conditional on the completion of the company, and to take effect after the certificate of complete registration act of parliament, charter, or letters patent, shall have been obtained; and, except in the case of companies for executing works by the authority of parliament, contracts for services in making surveys and performing all other acts necessary for obtaining an act of incorporation, or other act for enabling the company to execute such works.

Penalties on transfers of shares after provisional and before complete registration.—It is also enacted (s. 26) with regard to subscribers, and every person entitled or claiming to be entitled to any share in any joint stock company, the formation of which shall be commenced after the first day of November, 1844, that until such joint stock company shall have obtained a certificate of complete registration, and until any such subscriber or person shall have been completely registered as a shareholder in the registry office, it shall not be lawful for such person to dispose

by sale or mortgage of such share, or any interest therein, and that every contract for or sale or disposal of such share or interest shall be void, and that every person entering into such contract shall forfeit a sum not exceeding 10*l.*; and that for better protecting purchasers, it shall be the duty of the directors of the company by whom certificates of shares are issued, to state on every such certificate the date of the first complete registration of the company; and that if any director or officer knowingly make a false statement in that respect, he shall be liable to the pains and penalties of a misdemeanor.

Transfers of shares in RAILWAY and PARLIAMENTARY WORKS COMPANIES are not within this section of the statute, as they are not named and specially provided for therein. (a)

LIABILITIES of the members of the COMMITTEE of MANAGEMENT of JOINT STOCK COMPANIES inter se.

A project for the formation of a joint stock company is generally brought before the public through the medium of a provisional committee. The projector generally announces his scheme to one or two friends and approvers, who form themselves into a provisional committee of management with power to add to their number, take offices for the company, appoint a solicitor, and issue public advertisements and prospectuses setting forth the object and advantages of the company, the amount of capital proposed to be raised and the number of shares to be issued. Men of rank, wealth, and influence are then sought for and induced to become members of the provisional committee and to take part in the carrying out of the undertaking.

So long as the general management of the project, and the control over the expenditure is vested in the hands of the provisional committee at large, the several members of that committee who have consented to act and have taken part in its proceedings are joint adventurers and partners in the carrying out of the undertaking; but when the management of affairs is withdrawn from their hands, and they are superseded in their functions by a committee of management, and have no longer any voice in the administration, nor any control over the purse-strings of the company, they descend to the rank and position of ordinary shareholders.

As regards the liabilities of the members of a provisional or select committee of management *inter se*, we have already seen that whenever a num-

(a) As to the sale, and purchase, and transfer of shares in railway and parliamentary works companies provisionally registered, see post, ch. 20, s. 1. *Young v. Smith*, 15 M. & W. 121.

ber of persons are jointly associated together and contribute labour or services, or money or goods, in furtherance of a common design, the law raises no implied contract or promise between them, or from any one or more of them in favour of another, for payment or remuneration for the services so rendered, or goods supplied, or for the repayment of the money advanced. (b) The services, therefore, rendered, and the things done by any one member of a managing committee in the discharge of the functions of such committee, cannot be made the subject of a claim for payment or remuneration on his part as against the committee at large. The things done by him individually have been done for his own benefit and advantage, as well as for the benefit of the rest of the promoters and managers; all are presumed to contribute in some shape or another to the advancement of the joint undertaking, and the supposed superior services of one cannot be made the foundation of a claim for remuneration from another. Thus, where a surveyor took an active part in the promotion of a railway company, gave notices of an intended application to parliament, and subscribed for some of the shares, it was held that he could not maintain an action against the co-projectors for work done by him and money paid in furtherance of the joint undertaking. (c) So where the inventor and patentee of a new scheme for making roads, got a number of gentlemen to act as a provisional committee for the formation of a joint stock company to carry his scheme into effect and work the patent, and acted as secretary to the committee, it was held that he could not maintain an action against such committee, or any of the members thereof, for his services as such secretary, or for his trouble, or for journeys undertaken by him in furtherance and execution of the scheme, as he was himself one of the movers and instigators of the project, and the members of the committee had just as much right to charge him for their attendance and attention to his scheme, as he them for his services as secretary. (d)

CONTRIBUTION *as between the members of a committee of management.*—But this rule and principle of law does not extend to collateral matters incidentally growing out of the joint adventure, and not immediately connected therewith, and not involving in any way the consideration of partnership accounts or a claim upon a partnership fund. Thus where an action was brought against four persons who had acted as managers and directors of a projected railway company for the recovery of a debt contracted by them in the carrying out of the project, and they jointly retained

(b) Ante, 284, 285. *Brown v. Tapscott*, 6 M. & W. 119.

penny v. Hartland, 1 C. & P. 356.

(c) *Holmes v. Higgins*, 1 B. & C. 74. *Money-*

(d) *Parker v. Fry*, 2 C. & P. 311, 313, per Abbot, C. J.

an attorney to defend the action upon their own responsibility, and one of the managers was subsequently compelled by the attorney to pay more than his proportion of the joint expense of defending the action, it was held that he was entitled to an action against his colleagues to recover from them their several proportions of the over payment by way of contribution to the common liability, and that the law would imply a promise from them to pay him their several proportions of the amount as money paid by him to their use, inasmuch as the money had not been voluntarily advanced by him in furtherance of the main object of the adventure, and was not payable out of any partnership fund, but had been paid to discharge them from an individual personal liability attaching upon their own private pocket, and was in nowise distinguishable from a payment by any one of several joint contractors in ordinary cases to discharge a joint liability, and in respect of which contribution was clearly recoverable.(e)

LIABILITIES as between the committee of management on the one hand and the SUBSCRIBERS and SHAREHOLDERS on the other.

As between the projectors and managers on the one hand, and subscribers and shareholders and *quondam* provisional committee-men who have descended to the rank and position of mere subscribers and shareholders on the other, and who have agreed simply to become members of the company provided it is formed on the basis advertised and set forth by the projectors, and who have not attended meetings or taken an active part in bringing the company into existence, no partnership whatever exists. The execution by a subscriber of a deed providing that a company is to be formed upon certain terms and conditions; that a certain amount of capital is to be raised, a certain number of shares issued, an act of parliament obtained, and other preliminary proceedings undertaken prior to the incorporation or complete registration of the company, does not make the subscriber so executing the deed a partner with the projectors and managers in carrying out the undertaking. The partnership, as between the former and the latter, does not arise until the capital has been subscribed, the shares allotted, and the company has been fully formed and completely registered, and launched as a present partnership.(f) Neither does an agreement to take shares, or the acceptance of an allotment of shares, and payment of a deposit thereon, make the party who has entered into the agree-

(e) *Edger v. Knapp*, 6 Sc. N. R. 707. And see ante as to contribution between parties.

(f) *Wontner v. Shairp*, (C. P.,) *Sittings after Trin. Term*, 1846.

ment or paid the deposit a partner with the projectors and managers until the prescribed capital has been raised, the shares taken, and the conditions precedent to the formation and complete registration of the company have been accomplished ; unless, indeed, those conditions have been subsequently waived, and the subscribers and shareholders have assented to the company's going on and commencing operations with a less amount of capital and shares. They stand merely in the position of persons who have offered to become partners in a projected copartnership, provided it is constituted and brought into operation *bonâ fide* in the mode advertised and announced, and not in the position of partners in a present partnership.(g) A mere allottee or subscriber, therefore, is not precluded from suing the board of management or the individual members thereof by any of those technical rules of the common law which prevent one partner from suing another.

Liability of the subscribers and shareholders to the committee of management.—*Payment of subscriptions and deposits.*—The managers or members of the committee of management may consequently sue the subscribers or shareholders for the sums they have agreed to subscribe in return for a share or interest in the undertaking, or for the deposits which they have expressly or impliedly agreed to pay on receiving an allotment of shares, provided the members of such committee have acted with good faith, and have not procured the covenant or contract to pay the subscription or deposit through the medium of any wilful and fraudulent misrepresentation or misstatement. If they have sanctioned or authorized false and fraudulent statements and announcements concerning the amount of capital subscribed for, the number of shares allotted, and the actual condition of the company, and have thereby induced third parties to become members of the company, and to covenant or agree to pay subscriptions or deposits in furtherance of the undertaking, the contracts so obtained are void, and no action can be maintained upon them for the recovery of such subscriptions and deposits.

Liability of the members of the managing committee to the subscribers and shareholders.—The promoters and projectors and members of the committee of management, on the other hand, are responsible to the subscribers and shareholders for money advanced, or goods supplied, or work done, or services rendered in furtherance of the project by any one or more of such subscribers by the orders, or at the request of the members of such committee of management.(h) They are responsible also to

(g) *Bourne v. Freeth*, 9 B. & C. 640, 641 ; 4 M. & R. 518, 519, s. c. *Wood v. Duke of Argyll*, 7 Sc. N. R. 885 ; 6 M. & Gr. 928.

(h) *Colley v. Smith*, 2 Moo. & Rob. 96. *Attwood v. Small*, 1 M. & R. 264.

a subscriber or applicant for shares, who has received from them letters of allotment of shares or of an interest in the undertaking, and has paid his subscription or deposit for the non-delivery of scrip certificates of shares pursuant to the letters of allotment and the contract in that behalf made. And it has been held that an allotment of scrip and shares in an abortive scheme, which does not correspond with the prospectus and the public advertisements of the projectors, is not a compliance with the ordinary undertaking to deliver shares.⁽ⁱ⁾ But there is no implied warranty or undertaking on the part of the promoters and managers, that all the expectations held out on the face of the scrip receipts shall be realized. ^(k)

Return of deposits on the abandonment of the project.—If the scheme is not carried out upon the terms of the prospectus or public announcement of the projectors and managers, the subscribers who have advanced money or paid deposits on the shares allotted to them are entitled to recover back the amount paid free from deductions and drawbacks in respect of the expenses that have been incurred by the managers in their attempt to bring the project to bear. The managers have no right to apply the money raised by deposits paid on the allotment of shares and by subscriptions, in defraying the preliminary expenses of an abortive scheme, unless an express stipulation is made with the allottees and subscribers on the allotment of the shares, and the receipt of the subscription that a certain sum per share is to be applied by such managers in defraying the expenses in case the project should be abandoned by them without the consent of such allottees and subscribers. The implied contract which the latter enter into with the managers by applying for and accepting an allotment of shares is a contract to become a partner and joint adventurer in the scheme, provided it is carried out according to the printed prospectuses and public announcements of the projectors and managers; and the deposits and subscriptions paid by them on the allotment of the shares are paid as an earnest or guarantee of their good faith, and as a pledge to the managers and projectors for the fulfilment of their implied undertaking. It is not to be presumed, in the absence of an express contract to that effect, that these deposits and subscriptions are to be applied in defraying the expenses incurred by the managers in hatching an abortive project, and if the managers and projectors do not think fit to go on with the undertaking, the consideration for the payment to them of the deposits and

(i) *Walstab v. Spottiswoode*, 15 Law J., N. S. (Q. B.) 198.

(k) *Shrewsbury v. Blount*, 2 Sc. N. R. 593.

subscriptions fails, and the parties are consequently entitled to recover back the money. "If persons" (observes Littledale, J.,) "set a scheme afoot, and assume to be the directors or managers, all the expenses incurred before the scheme is in actual operation must in the first instance be borne by them. When it is in operation, the expenses and charges of management should be borne by the concern, and then it may be fair that the preliminary expenses should be paid in the same way, for then the subscribers have the benefit of them." (1)

Thus where a scheme called the British Metropolitan Tontine was set on foot, and a prospectus was issued, stating amongst other things that the subscribers were to make weekly payments which were to be accumulated at the end of a year, and formed into shares, and invested in the funds or on good security for the benefit of such subscribers and shareholders, and the survivors of them, and the plaintiff became a subscriber, and paid a large sum of money by the direction of the managers to their banker, and the scheme was afterwards abandoned in consequence of the paucity of the subscribers and the insufficiency of the funds to carry it on, and the plaintiff then brought his action against the managers to recover the full amount of his subscription, it was held that he was entitled to recover it, and that the managers had no right to make any deduction therefrom in respect of the expenses that had been incurred. "It appears," observes Bayley, J., "that the printed prospectus was circulated with the authority of all the defendants; and therefore, they having lent themselves to it, they must all be bound by its obligations. Upon every object of this kind there must of course be some expense incurred, and the question is on whom that expense ought to fall,—upon the original projectors, or upon those persons who come in upon the notion that it is a scheme which will go on? The reason of the thing is, that it should fall on the original projectors, and not upon those who pay their money upon the principle that it will be an available object. The defendants here hold out that there is to be a tontine, and the party pays his money in confidence that the scheme will be perfected. It turns out that it will not succeed. . . . It seems to me, therefore, that the loss ought to fall on the projectors, and that they are not entitled to deduct anything from the plaintiff's money." . . . "Suppose," further observes Littledale, J., "there had been no subscriber at all, then the managers must have paid the expenses themselves. Suppose there had been but one subscriber, it would be very hard upon him if the directors could be allowed to say 'we

(1) *Nockells v Crosby*, 3 B. & C. 823, 824; 5 D. & R. 751, s. c.

cannot let you have any benefit from this scheme because there are no more subscribers. We find you are the only person who has subscribed, and therefore we charge you with the whole expense that has been incurred!' This case is very nearly the same. There were very few subscribers. The plaintiff subscribed nearly one half of the whole money, and then he is told 'we cannot go on with this scheme, your money has not been appropriated for the purpose for which you subscribed it. It has not only been lying idle, but you must pay all the expenses which we have incurred in endeavouring to establish a scheme which we have never set on foot but abandoned.' The hardship would be monstrous, and therefore I think that, with respect to the expenses incurred, the managers were in the same situation as if no money at all had been subscribed."^(m)

So where a prospectus for the formation of a railway company stated that the capital of the company was to be two millions sterling, in eighty thousand shares of 20*l.* each, and the plaintiff applied for, and received, an allotment of thirty shares, and paid a deposit of 2*l.* 12*s.* 6*d.* on each share, but seventy thousand shares only were allotted, and the project was abandoned, it was held that the plaintiff was entitled to recover from one of the members of the provisional committee of management the full amount of the deposit paid on the thirty shares so allotted, without any deduction in respect of the expenses. In this case it was contended that the subscribers become *quasi* partners, and that their subscriptions formed a common partnership fund, to be applied to the general benefit, so that no one could claim back his subscription; but the court held that such was not the true result of the transaction, and that no partnership ever actually commenced as between the subscribers and projectors.⁽ⁿ⁾ And this right on the part of a subscriber to recover back his subscription or deposit prevails, although he may have executed the ordinary subscriber's agreement or subscription contract under seal, and may have paid his deposit or subscription pursuant to a covenant in that behalf therein contained. It is important to every person who proposes to become a subscriber to a projected joint-stock company to have correct information concerning the actual condition of the projected undertaking, the amount of capital subscribed for, and the number of subscribers and coadjutors in the project, in order to determine the probable extent of his own liability if he becomes a subscriber, and any misstatement or representation by the managers in these particulars, which are matters peculiarly within their own knowledge and cognizance, is a fraud upon those who have

^(m) *Nockalls v. Crosby*, 5 D. & R. 760, 763,
3 B. & C. 823, 824, s. c.

⁽ⁿ⁾ *Walstab v. Spottiswoode*, 15 Law J., n. s.
(Exch.) 193, 198; 10 Jur. 498, s. c.

subscribed their money and connected themselves with the company in reliance upon their truthfulness, which entitles them to avoid the contract they have entered into with the projectors and managers, and recover back from them the amount of their deposits and subscriptions. (o)

In an action for the recovery of the deposit paid on an allotment of shares in a projected joint-stock company, it appeared that the plaintiff had applied for and obtained an allotment of sixty shares upon the faith of a prospectus issued by the authority of the provisional committee of management, stating that the capital of the company was to be three millions sterling, divided into 120,000 shares of 25*l.* per share; that the plaintiff subsequently paid a deposit of 1*l.* 7*s.* 6*d.* per share on his sixty shares, amounting to 82*l.* 10*s.* 6*d.*, and executed the parliamentary contract and subscribers' agreement upon the faith of a letter inserted in the public papers by the authority of the provisional committee, stating that the allotment of shares was completed, and expressing the regret of the committee at their inability to comply with the numerous applications they had received for shares in the company;—that at the time of the publication of this letter, 58,000 shares only had been allotted, the committee having retained more than half the shares in their own hands, for their own private use, although they had received applications for 400,000 shares; that subsequently a panic had arisen in the share-market, and the shares had decreased in value, and out of sixty-three members of the committee, who had each agreed to take 150 shares, only nineteen had paid their deposits; that a committee of management was then appointed by the provisional committee, which committee of management was unable to go before parliament in consequence of the deranged state of the company's affairs, and the neglect of the forty-four provisional committeemen to pay up their deposits on the 6,600 shares reserved for them, and the project was consequently virtually abandoned; and it was holden that the plaintiff was entitled to recover from two of the provisional committee, who had signed the scrip certificates of shares, the amount of the deposit he had paid to the bankers of the company, notwithstanding the execution by him of the subscribers' agreement and parliamentary contract, inasmuch as the payment of the deposit and the execution of the deed had been obtained through the medium of a false and fraudulent representation, by the provisional committee, concerning the allotment of the shares, and the general state and condition of the company. (p)

(o) *Wontner v. Shairp*, (C. P.,) Sittings after Trinity Term, June 23, 1846.

(p) *Wontner v. Shairp*, (C. P.,) Sittings after Trinity Term, 1846.

If it is expressed on the face of the letters of allotment, or is in any way made a term of the contract that a certain proportion of the deposit shall be applied in payment of the preliminary expenses of carrying out the undertaking, and shall not consequently be returned if the scheme proves abortive, such a provision or term of the contract will not prevent the subscriber from recovering the full amount of his subscription, or deposit, if it should appear that the money was obtained through the medium of a false and fraudulent representation, on the part of the managers, concerning the actual state and condition of the company.

LIABILITIES of the MEMBERS of the COMMITTEE of MANAGEMENT, PROVISIONAL COMMITTEE-MEN—and SUBSCRIBERS and SHAREHOLDERS, to THIRD PARTIES. (Ante, 383—387.)

Of the liability of managers and members of the committee of management to third parties.—All persons who take an active part in working out a project, who attend meetings at which resolutions are made, or orders given for the employment of agents or servants, or the supply of goods in furtherance of a joint undertaking, naturally render themselves jointly responsible for the remuneration and payment of the services rendered, or goods supplied in obedience to the orders so given.(g) Every person also, who holds himself out, or permits himself to be published to the world as one of the managers of an undertaking, is responsible as such whether he is an actual manager or not, and whether he does or does not take an active part in the conduct of the business. If there has been no publication of the party to the world, as a manager, but it is sought to make him responsible as such by reason of his having privately consented to accept of the situation, it must be shown that the party who seeks to charge him as a manager knew of such consent at the time he contracted with the managing committee.(r) But if he has been publicly announced as a manager, he is then chargeable as such to all parties who subsequently to such announcement have dealt with the managing committee, whether they did or did not at the time know that he was a director or manager, or had been represented as such. (Ante, 500.) All the actual and publicly reputed or nominal managers are responsible upon all orders given, or con-

(g) *Lake v. Duke of Argyll*, 6 Ad. & E., n. s. 477. *Braithwaite v. Skofeld*, 9 B. & C. 402. *Harrison v. Heathorn*, 6 Sc. n. s. 787. *Glenesser v. Hunter*, 5 C. & P. 66. *Ellis v. Schmoeck*, 3 M. & P., 220. *Doubleday v. Muskell*, 4 M. & P. 757, 7 Bing. 110, s. c. *Kerridge v. Hasee*, 9 C.

& P., 200. *Alderson v. Clay*, 1 Stark. 405. *Burris v. Smith*, 5 M. & P. 735. Ante, 386.

(r) *Vice v. Lady Anson*, 7 B. & C., 409.; 1 M. & E. 116, s. c.; 1 M. & M., 97, s. c. Ante, 449. *Holcroft v. Hoggins*, 15 Law J., n. s. (C. P.,) 129.

tracts entered into by the managing committee, at meetings at which they have not been present, as well as at those at which they have been present.^(e) Every member, or publicly reputed member, who does not think fit to attend to the active duties of his actual or apparent situation and office, may fairly be considered either to have given his colleagues a general authority to act as they may think fit, or to have sanctioned and approved their acts and contracts, and will be responsible accordingly. If he wishes to protect himself from the general liability resulting from his actual or apparent tenure of office, he must make himself acquainted with the proceedings of the managing body to which he belongs, or professes to belong, and if he disapproves of their management he ought to resign, and remove his name from the list of committee-men, and make his retirement from, as notorious as his accession to, the administration of affairs. "Every subscriber," (and every person who deals and contracts with the managing committee) "looks at the character and respectability of the members whose names appear as being engaged in the transaction; and it would necessarily lead to most dangerous consequences if a party can rid himself of liability as readily as he can a garment; if once a member, he continues so until he divests himself of his liability in a regular mode. By thus deciding, it will render persons of property and reputation cautious how they embark in speculations, from which they imagine they may easily get free, and leave others to struggle with difficulties which arise from the failure of projects into which they have been unwarily led."^(f)

If the business of the company has always been transacted through the medium of resolutions passed by the committee, and through orders given by the secretary, or some accredited officer of the company, one committee-man would not, it is apprehended, be responsible for the private and individual orders and contracts of a co-committee-man, or of any of the projectors made without the knowledge and sanction of the board, and of which he has known nothing until a claim is made upon him in respect thereof.

If a secretary is appointed by the committee, such secretary has an implied authority from all the members of the committee to contract for such things as are absolutely necessary to enable the committee to commence its operations, and properly fulfil the end of its existence. Thus, where a projected railway company was provisionally registered, and a com-

^(e) *Maudsley v Le Blanc*, 2 C. & P. 409, n. *Horsley v Bell*, Amb. 770; 1 Br. C. C. 101, n. ante, 383—387.

^(f) Best, C. J., *Perring v. Hone*, 12 Moore, 147. *Ellis v. Schmæck*, 3 M. & P. 228. *Doub'eday v. Muskell*, 4 M. & P. 760.

mittee of management was formed, and the defendant consented to become a member of such committee, and afterwards took the chair at one of its meetings, it was held that he was responsible for the payment of a stationer's bill, for pens, ink, and paper, supplied by the order of the secretary, for the use of the committee, after the defendant had become a member of it. "When I say," observes Alderson, B., "that a party is liable in such a case, I mean that under such circumstances the judge ought to direct the jury to find, and the jury ought as reasonable men to find, that the defendant, as a member of the committee, had constituted the secretary his agent to pledge his credit for all things necessary for the working of the provisional committee, and to enable it to go on. It is a question of fact, not a question of law. The jury in such cases are called on to infer from a man's conduct, that he gave authority to another to pledge his credit for particular things. Where a subscription has been entered into it would be quite the reverse, for if A. gives money to B. to do a certain act, the natural inference is, that B. is to spend the money and not to pledge A.'s credit; but, if A. gives B. authority to do something, but gives him no money for the purpose, then he may pledge the credit of his principal for what is necessary. For some things, I admit, the defendant could not be held liable, as for instance, if the secretary were to purchase a horse, or a carriage, or such like; but in this case, the defendant, as a member of the provisional committee, must have known that pens, ink, and paper, would be required for the use of the committee, as also a room to sit in, &c.; and it was therefore for the jury to infer whether he did not give authority to some one to pledge his credit for those things, and for such others as were necessary to carry on the concern; and the jury, as reasonable men, could not have found otherwise.^(u)

A question was raised in this case as to how far a minority of the committee would be bound by the acts and contracts of the majority. "The case has been put," observes Alderson, B., "of the defendant being one of a minority of the committee who dissented from these orders. I am by no means prepared to say that the defendant would not be exempt in such a case.^(x) The defendant, however, would be bound to make his dissent as notorious to the public, as his attendance at and participation in, the resolutions and proceedings of the committee;^(y) and ought, it is apprehended, in order to secure himself from liability, to withdraw from all further attendance at the meetings of the committee. If he continues to at-

(u) Alderson, B., *Bartlett v. Lambert*, 10 Jur. 417; 15 Law J., n. s., (Exch.), 805.

(x) 10 Jur. 417; 8 M. & W. 508.

(y) *Minnett v. Whitney*, 16 Vin. Abr. 244.

tend and to take part in their proceedings, he must be taken *quoad* the public, and third parties, to ratify and concur in the acts of the majority.

A person who has taken part in the management of the company, cannot, of course, be made responsible for the price of goods ordered, or work done, or upon contracts entered into, by the managing committee before he became a member, or held himself out to the world as a member of it; but, if after he has become a member of the committee, goods are delivered, or work done with his knowledge or concurrence, pursuant to orders previously given, he will be deemed to have adopted and ratified the contract, and will be responsible accordingly.⁽²⁾

The mere attendance of a party at a meeting called to consider the advisability of a scheme, and not to carry it into effect, and at which meeting no orders are given for expenses to be incurred, or for anything to be done for the purpose of working out the project, will not render the party responsible upon orders given at subsequent meetings which he has not attended.

Liabilities of provisional committee-men.—If the general management of the business of the company and the control over the expenditure are actually or apparently vested in the hands of a provisional committee, all the members of such provisional committee, and every person who has permitted himself to be held out to the public as a member thereof, will be responsible upon the contracts entered into by such committee. If there is both a provisional committee and a managing committee co-existing, and the provisional committee has the appointment of, and the control over, the managing committee, the members of the latter will be deemed to be the agents of the former, authorized to act for them as well as on their own account, and the members of the provisional committee will not consequently be released from responsibility by the appointment of the managing committee. But if on the appointment of the latter, the provisional committee is dissolved, and the members thereof have no longer any voice in the management, or any control over the expenditure, the acts and contracts of the managing committee are not the acts and contracts of the members of the preceding provisional committee, and the latter will not consequently be responsible thereon, provided the dissolution of the provisional committee, and the appointment of the select committee of management, has been made public and notorious, and notice thereof has been given to all parties who have been in the habit of dealing with the provisional committee.

(2) *Kerridge v. House*, 9 C. & P. 200.

If the provisional committee continues in existence and exercises certain functions, notwithstanding the appointment of a select committee of management, the members of such provisional committee will continue responsible upon the contracts of the managing committee, unless their control over the management has altogether ceased, and the termination of their authority has been made notorious to the public. It frequently happens that on the appointment of a select committee of management, the provisional committee is *functus officio*. Those of the members who have not taken up or accepted shares in the undertaking, have no longer any connexion with the company, and the others descend to the rank and position of ordinary shareholders. In cases of this description there is no pretence for holding the parties who were formerly members of the provisional committee responsible upon the subsequent contracts of the select managing committee, provided the alteration in the management has been made public and notorious, and the parties dealing with the company have had notice thereof.

Of the non-liability of the subscribers and shareholders to third parties.
—An agreement to take shares in a particular company, described in the prospectuses and advertisements of the projectors and promoters; an allotment of such shares, and the payment of the deposit thereon, do not make the allottees and subscribers partners *quoad* third persons, any more than *inter se*, until a company or copartnership answering the description given in such prospectuses and advertisements is formed and constituted, and brought into actual existence. There is therefore no implied authority to bind one another *ex contractu*, resulting from their situation and position as subscribers. “If a person engages to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, he gives no authority at all to any other individual until all those conditions are performed. If any of the other intended partners in the mean time enter into contracts, he is not bound by them, on the simple ground that he has not authorized them, (always supposing that he has not held himself out directly or indirectly to the party with whom the contracts are made, as having in substance given that authority). In those cases in which a plaintiff has not been induced by the defendant's representations to give credit to him, but seeks to fix him because he has really authorized the contract to be made, the plaintiff must show that authority, and an authority upon condition not performed is no authority at all.” (a)

(a) Parke, J., *Dickinson v. Valpy*, 10 B. & C. 142

The mere publication of a party to the world as a subscriber to a projected joint stock company, does not make him a partner in an existing partnership, and render him responsible upon orders and directions in which he has not expressly participated, for carrying out the scheme before the terms and conditions of the prospectuses and advertisements have been fully accomplished. (b)

A prospectus for the formation of a distillery company stated that the capital of the company amounted to 600,000*l.*, divided into 12,000 shares, of 50*l.* each, and that a deed of settlement was to be executed, and an act of parliament obtained; but seven thousand five hundred only of the twelve thousand shares were subscribed for and allotted, and no act of parliament was ever obtained; it was held that this was only a project of a company, and not an actually formed partnership; and that the subscribers and shareholders who had merely paid deposits on their shares, and had not in any way interfered in the management of the company, were not responsible as partners upon the contracts made by the directors for carrying on the concern. "We think," observes Tindal, C. J., "the matter proceeded no further than that the defendants had offered to become partners in a projected concern, and that the concern proved abortive before the period at which the partnership was to commence. And therefore with respect to the agency of the directors, which is the legal consequence of a partnership completely formed, we think the directors proceeded to act before they had authority from these defendants, for they began to act in the name of the whole before little more than half the capital was subscribed for, or half the shares were allotted. The persons, therefore, who contracted with the directors must rest upon the security of the directors who made such contract." (c) The committee-men and managers therefore of a provisionally-registered joint stock company are alone responsible for the payment of the preliminary expenses of bringing the company into existence. (d) The mere allottees of shares, or subscribers, or parties who have paid deposits on their shares, are not responsible for the acts and engagements of their co-allottees and co-subscribers, or for the debts and contracts of the projectors and promoters, and those who have taken an active part in bringing the company or partnership into life.

(b) *Bourne v. Freeth*, 9 B. & C. 640, 641; 4 M. & B. 518, 519, s.c. *Wood v. Duke of Argyll*, 7 Sc. N. B. 885; 6 M. & Gr. 928.
(c) *Fox v. Clifton*, 4 M. & P. 715; 6 Bing.

775, s.c.

(d) *Vice v. Anson*, 7 B. & C. 409. *Pitchford v. Davis*, 5 M. & W. 2. *Fox v. Frith*, 10 M. & W. 136.

SECTION II.

COMPLETELY REGISTERED JOINT STOCK COMPANIES.

Of the preliminaries to complete registration.—No provisionally-registered joint stock company is entitled (s. 7) to receive a certificate of complete registration, with its attendant *quasi* corporate privileges, (presently explained,) unless it be formed by some deed or writing, under the hands and seals of the shareholders; in which deed there must be appointed not less than three directors, and also one or more auditors; and there must also be set forth in a schedule thereto, in a tabular manner, and in the following order—the name of the company—the business or purpose of the company—the principal or only place for carrying on such business, and every branch office (if any)—the amount of the proposed capital, and the means by which it is to be raised, and where the capital, or part thereof, shall not be money, then the nature of such capital, and the value thereof—the amount of money (if any) to be raised, or authorized to be raised, by loan—the total amount of capital subscribed, or proposed to be subscribed, at the date of such deed—the division of the capital (if any) into equal shares, and the total number of such shares, distinguished by a separate number in a regular series—the names, occupations, and places of residence of all the then subscribers, according to the information possessed by the officers of the company—the number of shares which each subscriber holds, and the distinctive numbers thereof, distinguishing the number of the shares on which the deposit has been paid from those on which it has not been paid—the names of the then directors or trustees, and auditors, with their respective places of business, if any, occupations and places of residence, and also the duration of the company, and the mode or condition of its dissolution. It is provided also that such deed shall contain a covenant on the part of every shareholder, with a trustee on the part of the company, for the payment of the instalments on the shares taken by such shareholder—that it shall make provision for carrying on the business of the company in the mode pointed out by schedule A., annexed to the act, shall be signed by at least one-fourth in number of the subscribers, holding one-fourth of the maximum number of shares in the capital of the company, and certified by two directors, in the form prescribed by schedule B.; and on the production of such deed, with an abstract or index thereof, approved by the registrar, and a

copy for the purpose of registration, the registrar shall grant A CERTIFICATE of COMPLETE REGISTRATION.

It is enacted, moreover, (s. 7,) that the certificate of complete registration shall be taken as evidence of the proper provisions having been inserted in the deed of settlement, and that any defect or omission in such deed may be supplied by a subsequent deed, duly registered. All shareholders who have signed the deed of settlement, and have paid up their instalments and calls, and have been registered, are entitled (s. 26) to be present at all general meetings of the company—to take part in the discussions—to vote in the determination of any question there to be decided, either in person or by proxy, (unless precluded by the deed of settlement from voting by proxy)—and to vote in the choice of directors and auditors, subject, however, to the provisions of the deed of settlement in that behalf.

Joint stock companies existing prior to the 1st of November, 1844.—And as regards joint stock companies existing on the 1st of November, 1844, whether incorporated by act of parliament or charter, or privileged by letters patent, or established by virtue of a deed of settlement, or in any other way, it is enacted, (s. 59,) that if any such companies be constituted as is required by the Joint Stock Companies Act, or if they proceed to establish themselves upon the footing required by that act, they shall be entitled to a certificate of complete registration, and shall be clothed with all the powers and privileges of complete registration; and any directors or managers of such company, with the consent of three-fourths in value of the shareholders of such company present at a general meeting summoned for that purpose, may make such alterations in the constitution of the company as shall be necessary for enabling it to come within the provisions of the act, so as the same shall be approved of by the committee of the privy council for trade, the order of such committee to be sufficient evidence of such provisions having been complied with

Effect of complete registration.—On the complete registration of any company being certified by the registrar, (s. 25,) such company, and the then shareholders therein, and all the succeeding shareholders whilst shareholders are INCORPORATED from the date of such certificate by the name of the company as set forth in the deed of settlement, and for the purpose of carrying on the trade or business for which the company was formed, but only according to the provisions of the act, and of such deed, and for the purpose of suing and being sued, and of taking and enjoying the property and effects of the company. And it is provided, (s. 25,)

that it shall be lawful for the company during its incorporation (which is to continue until it shall be dissolved and all its affairs wound up) to use the registered name of the company, adding thereto "registered,—to have a common seal, (with power to break, alter, and change the same from time to time,) but on which must be inscribed the name of the company,—to sue and be sued by their registered name in respect of any claim by or upon the company, upon or by any person, whether a member of the company or not, so long as any such claim may remain unsatisfied—to enter into contracts for the execution of works or the supply of stores for any other necessary purpose of the company—to purchase and hold lands, tenements, and hereditaments in the name of the company, or of the trustees or trustee thereof, for the purpose of occupying the same as places of business of the company, and also (but with a licence for that purpose from the committee of the privy council of trade) such other tenements and hereditaments as the nature of the company may require—to issue certificates of shares—to receive instalments from subscribers of the amounts of shares not paid up—to borrow or raise money within the limitations prescribed by any special authority—to declare dividends out of the profits of the concern—to hold general meetings periodically, and extraordinary meetings upon being duly summoned for that purpose—to make at general meetings, specially summoned for that purpose, bye-laws for the regulation of the shareholders, members, directors, and officers of the company, such bye-laws not being repugnant to or inconsistent with the provisions of the act or of the deed of settlement of the company—to perform all other acts necessary for carrying into effect the purposes of the company in all respects as other partnerships are entitled to do—to appoint from time to time for the conduct and superintendence of the execution of the affairs of the company a number of directors, not less than three, for a period not greater than five years, with or without eligibility to be re-elected at the expiration of the term, as may be prescribed by any deed of settlement or bye-law; and also to appoint and remove one or more creditors and such other officers as the deed of settlement may authorize: subject, nevertheless, with respect to all such powers and privileges to the provisions of that act, and of the deed of settlement of the company, or any other special authority. (a)

The bye-laws must (s. 47) be reduced into writing, and authenticated by the common seal of the company, and registered at the registry office, and after that they must be printed and circulated amongst the share-

(a) As to the effect of complete registration in the case of a railway or parliamentary works' company, see post, ch. 20, s. 2.

holders and officers of the company. (b) The production of a written or printed copy of the bye-laws, with the registrar's seal of office attached thereto, is sufficient evidence (s. 48) of such bye-laws.

Of the keeping of the accounts.—The directors are to cause (s. 34) the accounts of the company to be duly entered in books to be provided for the purpose, and are, twenty-eight days prior to the ordinary meetings of the company, to deliver such accounts to auditors appointed by the shareholders who are to examine them and report thereon, and redeliver such accounts to the directors, and the directors, fourteen days previously to the ordinary meetings of the company, are to cause a full and fair balance sheet to be made up, which is to be examined and signed by them, or any three of their number, and also by the chairman of the company, and is to be recorded in the books of the company, and left open to the inspection of the shareholders fourteen days before and for one month after such ordinary meeting of the company. And the directors are, ten days before the ordinary meeting of the company, (subject, however, to the provisions of the deed of settlement, or any bye-law in that behalf,) to send a printed copy of the balance-sheet and auditor's report to every shareholder according to his registered address, and to cause such report to be read at the meeting of the company, together with the report of the directors. They are, moreover, required, fourteen days after the meeting, to return to the registry office a copy of the balance-sheet and of the report of the auditors thereon, in order that the same may be registered with the other documents relating to the company. (c)

Division of profits.—No shareholder is entitled (s. 26) to receive any dividends or profits, or possess any of the powers or remedies given by the act to shareholders, unless he has executed the deed of settlement of the company, or some deed referring thereto, and has paid up all instalments or calls due from him, and been registered as a shareholder in the register office.

Sales and transfers of shares, and liabilities of outgoing and incoming shareholders.—The directors of every registered joint stock company are to cause a book to be kept to be called the register of shareholders, and to enter from time to time therein—the names and addresses of all persons or corporations being shareholders of the company—the number of shares to which they are respectively entitled, distinguishing each share by its number, and also the amount of instalments paid on such shares. And every shareholder, (s. 50,) or if such shareholder be a corporation, then the clerk or principal officer of such corporation is to be permitted at all

convenient times to search the register gratis, and to have a copy thereof or of any part thereof on payment of sixpence for every one hundred and one words required to be copied. Every holder of a share in a completely registered joint stock company is, moreover, entitled (s. 51) to a certificate of his proprietorship specifying the share to which he is entitled, and the amount paid up in respect of such share at the date of the issue of the certificate, to which certificate the common seal of the company is to be affixed; and such certificate is to be *prima facie* evidence of the title of the shareholder to the share therein specified in all courts of justice, and before all judges, justices, &c.; but the want of such certificate is not to prevent the shareholder from disposing of his share. The act then provides (s. 53) for the renewal of such certificates when worn out or damaged, lost or destroyed.

Every shareholder in a completely registered joint stock company is entitled to sell and transfer his shares subject to the regulations contained in the deed of settlement, but such transfer (s. 54) must be made by a deed duly stamped (d) setting forth the full amount of the pecuniary consideration for such sale, and drawn up according to a form given in (schedule K.) of the act, or to the like effect. The directors are to cause a memorial of the instrument of transfer, when produced, to be entered in the "register of transfers," (e) and are to indorse such entry on the instrument of transfer on receiving a fee of one shilling. And it is provided that until such instrument of transfer has been produced at the office of the company, the purchaser of the share shall not be entitled to receive any of the profits of the company, or to vote in respect of such share; also that if at the time of the transfer the holder of the share shall not have paid the full amount due and payable to the company on every share held by him, he shall not be entitled to transfer any share, unless there be a provision to the contrary in the deed of settlement. Also (s. 18) that until the return of the transfer or other fact or event, whereby a person becomes the holder of any shares, be made pursuant to the provisions of the statute, it shall not be lawful for the company, its directors or officers, if such fact or event be known to them respectively, to pay to any such person any part of the profits of the concern, nor for any such person to sue for or recover any part of the profits arising in respect of such share, or in anywise to act as a shareholder, and that until the re-

(d) An *ad valorem* stamp is sufficient, although the transfer deed contains a covenant from the transferee to observe the company's rules and regulations as to holders of shares. *Wolsley v. Cox*, 2 Ad. & E., n. s., 321.

(e) *Daly v. Thompson*, 10 M. & W. 309. *Harvey v. Kay*, 9 B. & C. 356. *Cheltenham and Great Western Railway Company v. Daniel*, 2 Ad. & E., n. s., 281.

turn of the transfer of any share shall have been made pursuant to the provisions of the statute, the person whose share shall have been thereby transferred shall, so far as respects his liability to the debts and engagements of the company, and also as respects the reimbursement of any loss, damages, costs, and charges he may incur thereby, be deemed to continue a shareholder of the company.

And it is further enacted (s. 12) that if at any time any party to a transfer of a share, request, in writing, the directors to make a return thereof, the directors shall forthwith make the same, and that on proof of such transfer and such request to the satisfaction of the registrar, it shall be lawful for any such party to make a return of such transfer to the registry office, which shall be received, marked and registered, and with the same effect as is provided in the case of returns made by such companies.

Executory contracts for the sale of shares.—Stamps, &c.—It has been held that shares in a joint stock company are not “goods, wares and merchandise” within the meaning and operation of the statute of frauds. (f) Executory contracts for the sale and purchase of shares, are not, therefore, exempt from stamp duties under the exemption in the last general stamp act. (Ante, 26) All such contracts, and all agreements for sales and transfers of shares must, consequently, when reduced into writing, be stamped with a common half-crown agreement stamp. (g)

When no time is specified for the completion of an executory contract for the sale of shares in a joint stock company, the printed rules and customs of the Stock Exchange are admissible in evidence, to show what is a reasonable time, under all the circumstances of the case, for the fulfilment of the bargain by the execution on the part of the vendor of the deed of transfer of the shares, and the payment on the part of the purchaser of the purchase money. (h) It is the duty of the purchaser to tender the deed of transfer to the vendor for execution, as in the case of a sale of realty, and he cannot bring an action against the latter for a breach of contract in not delivering or transferring the shares, without averring and proving such tender of the deed on his part. (i) If the transfer requires the assent of the directors in order to be valid, it was the duty of the vendor to procure such assent, and if he fails in so doing, and the transfer is consequently invalid, the purchaser may bring an action against him to recover back the money he has paid for the shares. (k)

(f) Ante, 98. *Humble v. Mitchell*, 11 Ad. & E. 205.

(g) *Knight v. Barker*, (Exch.), Nov. 5, 1846. 7 & 8 Vict. c. 21; Ante, 129. *Pawle v. Gunn*, 6 Sc. 286; 4 Bing. N. C. 455.

(h) *Stewart v. Canty*, 8 M. & W. 160.

(i) *Stephens v. De Medina*, 4 Ad. & E., n. s. 428. *Bowlby v. Bell*, 10 Jur. 669 (C. P.)

(k) *Leeman Lloyd*, 14 Law J., n. s. (Q. B.) 165.

On an executory contract for the sale and purchase of shares there is no implied undertaking on the part of the purchaser to indemnify the vendor against calls made on him in respect of the shares between the time of the making of the contract and the execution and registration of the transfer. (l) All executory contracts, therefore, for the sale and purchase of shares, in respect of which calls are likely to be made before the contract can be completed, should contain an express provision for the payment of the calls by the purchaser. (m)

The directors are not responsible for the failure of anticipations of success and profit put forth on the face of the scrip certificates of shares signed by them, unless there has been some fraudulent misrepresentation made with a view of inducing parties to embark capital in the purchase of shares. (n)

Of the liabilities of INDIVIDUAL SHAREHOLDERS to the COMPANY at large, and of the COMPANY to the SHAREHOLDERS INDIVIDUALLY.—We have already seen that as soon as the complete registration of a joint stock company has been duly certified by the registrar, the company is clothed with the privileges of a corporate body as regards suing and being sued. Any one of the members consequently is entitled to sue the company by its registered name upon contracts which have been entered into with the company by the individual member; and the company, on the other hand, is entitled to sue any individual member upon such contracts unfettered and unincumbered by the rule of law, which, in the case of ordinary partnerships, precludes one partner and member of a firm from suing his copartners or the firm at large.

After the complete registration of the company has been certified by the registrar, any covenants or engagements which have been entered into by any of the shareholders or other persons with any trustee on behalf of the company, at any time before the complete registration thereof, may be proceeded on (s. 25) by the company, and enforced in all respects as if they had been made or entered into with the company after its incorporation.

Liability of the shareholders on calls by the directors.—If any shareholder (s. 55) fails to pay any instalment of capital due upon, or in respect of, any share held by him when the same shall become due, the company is authorized to sue such shareholder for the amount in an action of debt in any court having competent jurisdiction in respect of the same; and it is provided, that in the declaration in any such action it shall be sufficient

(l) *Humble v. Langston*, 7 M. & W. 517.

(m) See further as to sales and purchases of

shares, post ch. 20, s. 1, p. 541—545.

(n) *Shrewsbury v. Blount*, 2 Sc. N. R. 593.

to state that at the time of the commencement of the suit the defendant, as the holder of certain shares (stating how many) in a certain company or undertaking, as the case may be, (naming it,) was indebted to the company in a certain sum, (stating the amount of the instalments, or so much thereof as is sought to be recovered,) for certain instalments of capital then due, and payable in respect of the said shares, and that the defendant hath not paid the same; and that if, upon the trial of any such action, it shall be proved that the defendant was the holder of any share, when such instalments, or any of them in respect of the same, and for which the action is brought, became due, then such company shall recover such instalments, or so much thereof as is due, together with interest for the same at the rate of 5*l*. per cent. per annum, to be computed from the day on which such instalment shall have become due.

If the subscribers or shareholders have entered into an absolute and unconditional covenant for the payment of subscriptions or calls, they are responsible for all such sums as are demanded by the directors in the mode provided by the deed of settlement, whether the other shareholders have or have not paid up their calls and subscriptions. (o) If the whole of the capital is to be subscribed for, before the calls are made, the shareholders cannot then be made liable upon calls until the subscription has been completed. (p)

When it is provided that the shares shall be forfeited in case of the non-payment of calls, the forfeiture does not attach until it has been reported to and sanctioned by a general meeting of proprietors. A mere notice of forfeiture, therefore, will not excuse a proprietor or holder of shares from the payment of calls. (q) If the shareholder has sold his shares and executed the transfer deed, he remains liable for calls until a memorial of the instrument has been produced and entered in the register of transfers at the office of the company; but after that has been done, and the change of proprietorship has been accomplished according to the provisions of the deed of settlement, and of the act of parliament, the liability is shifted from the outgoing to the incoming shareholder. (r) As soon as the transfer is accepted and registered by the company, the transferee is substituted for the transferor, and becomes the debtor of the company in

(o) *Hutt v. Giles*, 13 Law, J., N. S. (Exch.) 337. *Meigh v. Clinton*, 11 Ad. & E. 418.

(p) *Norwich and Lowes. Co. v. Theobald*, 1 M. & M. 151.

(q) 6 M. & W. 707. *Birm. &c. Rail. Co. v. Locke*, 1 Ad. & E., N. S., 256.

(r) *Aylesbury Rail. Co. v. Mount*, 5 Sc. N. B. 127. As to the liability of unregistered subscribers in respect of calls by the directors, *West Lond. Rail. Co. v. Bernard*, 13 Law, J., N. S., (Q. B.) 68.

respect of all future calls upon the shares, in lieu of the original holder and subscriber.

The resolutions of the directors making a call need not state the place at which, or the person to whom, the money is to be paid. If the shareholder and subscriber has received the requisite notice by advertisement or otherwise of the call, he is bound to pay the money within the time limited to the parties mentioned in the notice as being authorized to receive the money, or to the accredited banker and treasurer of the company.^(s)

Of the LIABILITY of the SHAREHOLDERS in respect of the DEBTS and ENGAGEMENTS of the COMPANY after COMPLETE REGISTRATION.

Before complete registration the members of the committee of management are alone responsible, as we have already seen, upon the contracts they enter into, and for the payment of the persons they employ in carrying out their project; but after complete registration these expenses fall upon the company at large, and if the cash in the hands of the treasurer, or the common property of the company, is insufficient to defray them, they must be borne by the shareholders individually.^(t) All the members and shareholders become, after complete registration, individually responsible for the debts and engagements of the company, if the funds in hand and the common property prove insufficient to satisfy the claims of creditors. By the 25th section of the act, it is enacted that the complete registration and consequent incorporation of any company under the provisions of the act shall not in anywise restrict the liability of any of the shareholders of the company under any judgment, decree, or order, for the payment of money which shall be obtained against the company, or any of the members thereof, in any action or suit prosecuted by, or against, such company in any court of law, or equity; but that every shareholder shall, in respect of such monies, subject as therein and hereinafter mentioned, be and continue liable as he would have been if the company had not been incorporated. And as regards companies in existence at the time of the passing of the act, and which shall afterwards have obtained a certificate of complete registration and consequent incorporation pursuant to the statute, it is enacted (s. 56) that every such company and the members and

^(s) *Great North of England Rail. Co. v. Bid-
dolph*, 7 M. & W. 243. *Lond. and Bright.
Rail. Co. v. Fairclough*, 3 Sc. N. R. 68.
Sheffield and Manchester Rail. Co. v. Woodcock,
ib. 574. *Kidwelly Canal Company v. Raby*, 2
Pr. 96. *West Lond. Rail. Co. v. Bernard*, 13

Law, J., n. s. (Q. B.) 68.

^(t) *Abbott, C. J., Money Penny v. Hartland*, 1
C. & P. 353. *Littledale, J., Nockels v. Crosby*
3 B. & C. 824; 5 D. & R. 763. *Beech v. Eyre*
6 Sc. N. R. 338.

officers thereof, shall be liable, notwithstanding such incorporation, to be sued in respect of any valid obligation incurred before such incorporation, in the same manner and with the same legal consequences as if such company had not been incorporated. But judgments and decrees obtained against the company cannot be enforced against the person and property of the individual shareholders until after due diligence has been used to obtain satisfaction of such judgments from the common property. (s. 66, post, 533.)

The liability of the members and shareholders is not limited by the *quasi* incorporation to the amount of their several shares and subscriptions, but they remain responsible in case of the insufficiency of the funds of the company to meet its engagements, to the full extent of their private fortunes, as in ordinary cases of copartnership (*u*)

No private agreement between the shareholders and directors limiting and restricting the apparent general authority of the latter to bind the company by their contracts, or qualifying and limiting the liability of the shareholders upon such contracts, will be of any avail as against the claims of creditors of the company who have dealt with the directors in ignorance of the particular limitations and restrictions placed upon their apparent general authority. A stipulation in the deed of settlement, for example, restricting the directors from dealing on credit will be nugatory as against third parties ignorant of the restriction. (*x*) And if in such deed it is stipulated "that no person is to be accountable beyond the amount of the share for which he shall subscribe, this is a mischievous delusion calculated to ensnare the unwary. As to the subscribers themselves, indeed, they may stipulate with each other for this contracted responsibility, but as to the rest of the world it is clear that each partner is liable to the whole amount of the debts contracted by the partnership." (*y*)

Pecuniary qualification of DIRECTORS.—No person can be legally appointed (s. 28) to act as director, whether honorary or otherwise, or to hold the office of patron or president, or any other office of the like description, nor can any person legally act in any such capacity, unless he holds in his own right at least one share in the capital of the company; and every person who acts as director, patron, or president of the company, or who permits himself to be held out to the public as a director, patron, or president, or as holding any office of the like description, with-

(*u*) Ante, 479. *Keasley v. Codd*, 2 C. & P. 408, n.; post, 533.

(*x*) *Hawken v. Bourne*, 8 M. & W. 709. *Lawler v. Kershaw*, 1 M. & M. 93.

(*y*) *Ellenborough, C. J., Rex v. Dodd*, 9 East, 527. *Walburn v. Inghiby*, 1 M. & K. 76. Ante, 481.

out holding in his own right at least one share, subjects himself to a penalty not exceeding 20*l*.

Of the power of the directors to bind the company.—The directors of all registered joint stock companies are expressly authorized (s. 27) to enter into all such contracts, and do and execute all such acts and deeds as circumstances may require, in order to conduct and manage the affairs of the company according to the provisions and subject to the restrictions of the Joint Stock Companies' Act, and of the deed of settlement and of any bye-law or special authority. But it is provided (s. 46) that all DEEDS and instruments bearing the SEAL of the company shall be signed by two at least of the directors of the company. And (s. 44) for the purpose of regulating contracts entered into by or on behalf of the company, (except contracts for the purchase of an article not exceeding 50*l*. in value, or contracts for service for a term not exceeding six months, and the consideration for which doth not exceed 50*l*., and except bills of exchange and promissory notes,) it is enacted that every such contract shall be in writing and signed by two at least of the directors of the company on whose behalf the same shall be entered into, and shall be sealed with the common seal thereof, or signed by some officer of the company on its behalf, to be thereunto expressly authorized by some minute, or resolution of the board of directors, applying to that particular case; and that in the absence of such requisites, or any of them, such contract shall be void and ineffectual (except as *against* the company on whose behalf the same shall have been made). And as regards contracts for the purchase of articles for a price not exceeding 50*l*., and contracts for services for a term not exceeding six months, and the consideration for which does not exceed 50*l*., entered into on behalf of the company, it is enacted that the same may be entered into by any officer authorized by a general bye-law in that behalf, and that every such contract, whether under seal or not, shall, immediately after it has been entered into, be reported to the secretary or other appointed officer of the company on whose behalf the same shall have been entered into, who shall enter the same in proper books to be kept for that purpose, and that if any such contract be not so reported and entered, then the officer by whose default such contract shall not be so reported or entered shall be liable to repay to the company on whose behalf such contract may be made, the amount of the consideration agreed to be paid by or on behalf of such company in respect of such contract.

Also, that if any director be either directly or indirectly concerned or interested in any contract, (except a policy of assurance, grant of annuity, or contract for the purchase of an article or of service, which is

respectively the subject of the proper business of the company, and made upon the same or like terms as any like contract with other customers or purchasers,) the terms of such contract shall be submitted to the next general or special meeting of the shareholders to be summoned for that purpose; and that no such contract shall have force until approved and confirmed by the majority of the votes of the shareholders present at such meeting. And that if at any time any director cease to be a holder of the prescribed number of shares, or shall become bankrupt or insolvent, or suspend payment or compromise with his creditors, or be declared a lunatic, then it shall be unlawful for any such director to continue as a director or to act as such, and the office is declared to be vacant. But it is enacted, (s. 30,) that notwithstanding it may afterwards be discovered that there was some defect or error in the appointment of any person acting, or who may have acted as a director, or that such person was disqualified, yet all acts done by him as such director before the discovery of such defect or error, either solely or with other directors, shall be as binding on him and the company and the directors and officers thereof, as if such person had been duly appointed or qualified.

Contracts under SEAL, therefore, not authenticated in the mode pointed out by the statute, and executed in conformity with the authority given by the directors in that behalf, will not be binding upon the company, but must be enforced against the directors who have executed them and contracted therein on behalf of the company. (2)

Bills of exchange and promissory notes.—And as regards bills of exchange and promissory notes made, accepted, or indorsed on the behalf or account of any such company, so far as relates to the mode of making, accepting, or indorsing the same, and of the liability of the company thereon, it is enacted that if the directors of the company be authorized by deed of settlement or bye-law to issue or accept bills of exchange or promissory notes, then every such bill of exchange or promissory note shall be made or accepted (as the case may be) by and in the names of two of the directors of the company on whose behalf or account the same may be so made or accepted, and shall be by such directors expressed to be made or accepted by them on behalf of such company, and that every such bill of exchange and promissory note so made or accepted as aforesaid shall be countersigned by the secretary or other appointed officer of the company in whose behalf the same is expressed to be made or accepted, and that every bill of exchange so made, or any bill received

(2) Ante, 371, 393, 420—422, 477. *Hall v. Bainbridge*, 1 Sc. N. R. 151.

by or on behalf of the company, may be indorsed in the name of the company by any officer authorized by deed of settlement or bye-law in that behalf; and every such bill of exchange or promissory note so made, accepted, or indorsed, shall immediately afterwards be reported to the proper officer of the company, and entered in books to be kept for that purpose, and if not so reported or entered, the officer guilty of the omission is bound to repay to the company the amount which it shall pay or be liable to pay in respect of such bill or note. But it is provided that nothing in the act shall be deemed to make any such secretary or officer personally liable upon such bill or note, nor to make the directors liable thereon, except as shareholders of the company, and that every company on whose behalf or account any bill or note shall be so made, accepted, or indorsed, may sue and be sued thereon as fully and effectually, and in the same manner as on contracts entered into under their common seal.

If no authority has been given by the company to the directors to draw bills or notes, and the carrying on of the business of the undertaking does not necessarily require them to be drawn, the company is not bound, but the parties whose names appear on them can alone be sued thereon. (a)

Execution against the present and former shareholders of judgments recovered against the company.—Every judgment and decree which shall, at any time after the passing of the act, be obtained against any completely registered joint stock company. (except companies incorporated by act of parliament, or charter, or companies, the liability of the members of which is restricted by virtue of letters patent,) in any action or suit, prosecuted by or against the company, may be enforced, and execution thereon be issued, not only against the property and effects of the company, but also (if due diligence shall have been used to obtain satisfaction thereof by execution against the property and effects of the company) against the person, property, and effects of any shareholder for the time being, or any former shareholder in his natural or individual capacity, until such judgment or decree shall be fully satisfied; provided, in the case of execution against any former shareholder, that such former shareholder was a shareholder of the company at the time the contract or engagement for which the judgment, decree, or order has been obtained was entered into, or became a shareholder during the time such contract or engagement was unexecuted, or unsatisfied, or was a shareholder at the time of the judgment, decree, or order being obtained; but no execution

(a) *Connell v. Lawyer*, 2 Jur. 1085 (Q. B.) *Bull v. Morrell*, 12 Ad. & E. 58.

places of abode of all persons who shall either have ceased to be shareholders of the company, or have become shareholders otherwise than by transfer of shares, since the preceding half-yearly return, or since the complete registration of the company; and also of the changes of the names of all shareholders whose names shall have changed by marriage, or otherwise, since the last preceding half-yearly return, or since the complete registration of the company. And every director failing to make the required returns within the period prescribed by the act, is subjected to a penalty not exceeding 20*l*.

Authentication of the returns and registration thereof.—And it is provided, (s. 15) that when the particulars and documents required by the act to be returned to the registry, shall have been returned, the registrar shall write thereon the day of the receipt thereof, and number such documents and returns according to the order of their receipt, and give an acknowledgment of the receipt of them to the person bringing them, and then if they are found conformable to the provisions and requirements of the act, he is to register them, and, on demand, to grant the company a certificate of provisional or complete registration, as the case may require, signed by him, and sealed with the seal of his office; which certificate is to set forth whether the company has been constituted provisionally or completely; and in the absence of evidence to the contrary, any such certificate, or a copy of any such return, is to be received in evidence, without proof of the signature or seal of office affixed. Until the company shall have obtained a certificate of complete registration, the promoters, or their solicitor, are to make (s. 16) such returns, and after complete registration, the duty devolves upon the directors. The returns are required to be signed by one or more of the promoters, or by the solicitor, or by one or more of the directors, according as they may be made before or after complete registration, and when made after complete registration, they are to be sealed with the company's seal. But the committee of the privy council for trade is empowered (s. 17) to make different regulations for the making of such returns, or to dispense with them altogether, provided their proceedings in the matter are published in the London Gazette, and are made applicable to all companies within the operation of the act.

Inspection of the returns.—The act provides (s. 18) for the inspection of the returns at the registry office, by the public, and in the procurement by every person, of a certified copy or extract of such returns, which is to be received in evidence in all courts of law and equity, and elsewhere, without proof of the signature thereto, or of the seal of office affixed thereto.

Of the DISSOLUTION of JOINT STOCK COMPANIES, and the winding up of their affairs.—The act of 7 and 8 Vict., c. 111, recites, that it is expedient to extend the remedies of creditors against the property of such joint stock companies as are unable to meet their pecuniary engagements, and to facilitate the winding up of their concerns; and provides, (s. 1,) that if any joint stock company then in existence, or which may thereafter be established, shall make a declaration of insolvency, or commit an act of bankruptcy, (defined by that statute,) a fiat in bankruptcy may be issued against the company, and be prosecuted in like manner as against other bankrupts. But the bankruptcy of the company is not (s. 2) to be construed to be the bankruptcy of the individual members thereof. The act then specifies (ss. 4, 5, 6, 7,) what acts and proceedings on the part of the company or the directors shall amount to an act of bankruptcy, and authorizes (s. 8) the assignees of the estate and effects of the company to maintain actions and suits for the recovery of debts due to the company, and for the proof of claims against the company under the fiat. No shareholder is to be permitted (s. 9) to set off a claim or demand which he has against the company in respect of his share, or of any dividends or profits payable thereon, against any demand which the assignees may have against him; and no creditor is to be deprived (s. 10) of his right to issue a fiat against the company, or to prove debts under such fiat, by reason of his having commenced an action or suit against any one or more of the members or former members of the company individually; neither is the issue of a fiat by such creditor to deprive him of his right to proceed against the individual members or former members of the company; but no execution in respect of debts or demands proveable under the fiat is to be issued against the person or property of any member or former member of the company, until *after* they have been proved under such fiat; nor is any execution to be issued after the appointment of a receiver, without leave of the Court of Chancery.

The general law and practice of bankruptcy is extended to fiats issued under the act, except where it is excluded by the express provisions of the statute.

Provision is made (ss. 11—18) for the preparation and filing of balance sheets and accounts, after adjudication, for making allowances out of the estate of the company for the expenses; for the surrender and examination of parties charged with the making out of the accounts, and the preparation of the balance sheet; for the examination of witnesses; the production of books and papers; and for the delivery to the official assignee of all monies and securities for money belonging to the company. The

Court of Chancery is authorized (s. 19) to appoint a receiver, and to make orders for the winding up of the affairs of the company, and for enforcing contribution from the members for the satisfaction and discharge of the outstanding debts; and after such receiver has been appointed, no execution is to be issued (s. 10) against any member or former member of the company, by any of the creditors thereof, without leave of the court.

Previous to passing the last examination under the fiat, the court is to inquire into the cause of the failure of the company, (s. 25,) and to send a copy of the balance-sheet, with a certificate of their opinion as to the cause of failure, to the committee of the privy council for trade. The sovereign is then authorized, (s. 86,) upon the recommendation of the said committee, by writing under the great seal, or under the privy seal, to revoke and make void all the powers, privileges, and advantages granted to the company, and put an end to its existence.

CHAPTER XX.

RAILWAY AND PARLIAMENTARY WORKS' COMPANIES— CORPORATIONS AT COMMON LAW—PARTNERSHIPS UN- DER LETTERS PATENT, AND JOINT STOCK BANKING COMPANIES.

SECTION I.—*Railway and Parliamentary Works' Companies.*—Provisional registration thereof—Inutility of complete registration—Liabilities of the promoters during provisional registration—Recovery of deposits—Sales of letters of allotment and scrip—Of the bankruptcy and dissolution of provisionally-registered railway companies—Incorporated railway companies—Registration of the subscribers and scripholders—Extinguishment of the liability of the original subscribers—Transfers of shares and stock after incorporation—Transmission of the interest therein by bankruptcy or insolvency, marriage or death—Of the liability *ex contractu* of the directors and shareholders—Of the liability for calls—Mandamus to make calls—Of the power of the directors and committees to bind the company—Execution against the shareholders.

SECTION II.—*Corporations at Common Law.*—Effect of incorporation at common law—Liability *ex contractu* of the body corporate—The common seal the hand and mouth of the corporation—Of the affixing of the common seal to contracts—Of corporate meetings, and the concurrence requisite in corporate acts—Exceptions to the general rule that a corporation can contract only under its common seal—Liability of corporate bodies upon simple contracts entered into in the discharge of its ordinary functions—Of the dissolution of corporations.

SECTION III.—*Partnerships under Letters Patent.*—Of the grant by the crown of certain corporate privileges to partnerships without incorporation—Of the privilege of suing and being sued in the name of a public officer—Limitation of the liability of the partners by the letters patent—Of the form of the partnership deed, and of the conditions to be complied with before letters patent can be obtained.

SECTION IV.—*Joint Stock Banking Companies.*—Of the creation and establishment of joint stock banking companies—Incorporation of the company—Transfers of shares—Liabilities of the shareholders to the company, and of the company to the shareholders individually—Payment of calls—Liability of the company and shareholders to third parties—Execution against the shareholders—Contribution between them to the common loss—Of the dissolution of the company—Companies and copartnerships excepted from the operation of the act.

SECTION I.

RAILWAY AND PARLIAMENTARY WORKS' COMPANIES.

Of the formation and establishment of Railway and Parliamentary Works' Companies.—We have already seen, that by the fourth section of the Joint Stock Companies' Act, every company or association for the execution of any work under the authority of parliament must, before the proposal for its formation has been made public, be provisionally registered by the promoters; and that for this purpose returns of the proposed name and object of the company, and of the names, occupations, and addresses of the promoters must be made to the registrar, together with the other customary returns required from all joint stock companies coming within the operation of the fourth section of the statute, (ante, s. 1, 511.) After being provisionally registered, the company may proceed to get an act of incorporation, and the requisite powers for the carrying on of the undertaking. Complete registration is not usually sought for, as no advantage occurs therefrom. By the 26th section of the Joint Stock Companies' Act, it is provided, with regard to companies for executing any bridge, road, cut, canal, reservoir, aqueduct, water-work, navigation, tunnel, archway, railway, pier, port, harbour, ferry, or dock, which cannot be carried into execution without obtaining the authority of parliament, that on the complete registration of any such company, and before such company shall have obtained its act of incorporation, or other act, whereby the authority of parliament shall be granted for executing such work, it shall not be lawful for any such company, or the directors or officers thereof, to enter into contracts otherwise than conditionally upon obtaining such act, or to exercise the power to purchase and hold lands, or to exercise the power to receive instalments from shareholders, beyond the sum or per centage necessary to be deposited in compliance with the standing orders of either house of parliament, or such other sum as may be requisite for obtaining the act of incorporation, or other act, for granting the authority of parliament to execute such work, or to exercise the power of borrowing money or declaring dividends. But the company may perform all such acts as are necessary for obtaining an act of incorporation, and the authority of parliament for the execution of its works; and upon the obtaining and coming into operation of such act of parliament, all the powers conferred by the Joint Stock Companies' Act,

and all the provisions and regulations thereof which shall apply to such company are to cease and determine.

Recovery of deposits in case of the abandonment of the undertaking.—We have already seen, (ante, 518,) that if a joint stock company is formed for the purpose of obtaining the authority of parliament for the execution of a railway, or other works, and the projectors abandon the undertaking, they are bound to return the deposits to the shareholders and subscribers, in the absence of an express agreement providing for the appropriation of such deposits and subscriptions in liquidation of the preliminary expenses. The original subscribers and shareholders are the only parties (strictly speaking) entitled to sue the projectors and managers for the recovery of these deposits; and if they have sold their shares and transferred their letters of allotment and scrip certificates to the purchasers, the latter cannot bring an action for the recovery of such deposits in their own names, but must sue the managers and projectors in the names of the original subscribers and shareholders from whom they derive their title.(a)

Sales and transfers of letters of allotment, and of scrip and shares in provisionally-registered railway and parliamentary works' companies, are not, as previously mentioned, within the 26th section of the Joint Stock Companies' Act, and are not, consequently, prohibited and rendered illegal by that statute.(b) Letters of allotment and scrip certificates of shares may consequently be bought and sold as soon as the company has been provisionally registered.

Executory contracts for the sale and purchase of shares and scrip must, as we have already seen, (ante, 526,) be stamped with a common half-crown agreement stamp. They are fulfilled on the part of the vendor by a tender of letters of allotment of shares, if there are no shares in the market, and the letters of allotment are commonly bought and received as shares upon the Stock Exchange.(c)

A broker bought for the plaintiff certain scrip certificates of shares in the Kentish Coast Railway Company, which had been bought and sold in the market as genuine scrip, but which turned out to be forged, or to have been issued without the authority of the company; and the plaintiff brought his action against his own agent, the broker, to recover from the latter the amount that he had paid him for the purchase of the shares; and it was held that it was a question for a jury to determine, whether the

(a) Ante, 307, 342.

(b) *Young v. Smith*, 15 Law J., n. s. (Exch.) 84; 15 M. & W. 121, n. c. *Shaw v. Holland*, ib. 145. *Lawson v. Hickman*, and *Loonis v.*

Oldfield, 10 Jur. (Q. B.) 543.

(c) *Mitchell v. Newhall*, 15 Law J., n. s., (Exch.), 292; 10 Jur. 318. *Tempest v. Kilner*, 15 Law J., n. s. (C. P.) 10.

plaintiff wished to buy and the defendant intended to sell him real Kentish scrip, or that which was in the market as such; (d) and if the broker, the plaintiff's own agent, had been guilty of no fraud or negligence in the execution of the commission entrusted to him, but had bought what was ordinarily sold in the market as Kentish Coast Railway scrip, he would not be bound to refund the money that he had received in payment of such shares, after it had passed through his hands, and been paid over *bonâ fide* to the purchaser. There is therefore no warranty or undertaking on the part of a broker employed to buy shares or scrip, that the article which merely passes through his hands is anything more than what it purports on the face of it to be, and what it is generally understood to be in the market. In the case of *Kempson v. Saunders*, (decided 7 Geo 4th,) when sales of shares and scrip in projected joint stock companies were viewed in a far different light from what they are at present, it was held that a purchaser of scrip certificates of shares in a projected railway company was entitled to recover back the purchase money from the vendor, on the abandonment of the undertaking by the projectors. "The defendant," (the vendor,) observes Best, C. J., "was not an original subscriber, but purchased the shares from a broker who sold for another at a premium; these shares were, in fact, not saleable, or articles of any value, until the company should be formed, and receive the sanction of the legislature. The defendant, therefore, in fact, sold mere pieces of parchment worth nothing, and obtained money from the plaintiff for a thing of no value; and it is an established rule of law, that where money has been paid over by one party to another without a valuable consideration, or on a consideration that fails, an action for money had and received will lie to recover it back.—If," he further observes, "the defendant bought of another, he may sue the seller to him, and such seller the party from whom he purchased, till at last we come to the ORIGINAL PROJECTORS, and in getting at them a great service will be done." (e)

As sales of letters of allotment and of scrip certificates of shares in provisionally registered railway and parliamentary works' companies are now considered to be perfectly legal, it can hardly be contended that a purchaser is entitled to recover back the purchase money he has paid if there has been no fraud or deceit on the part of the vendor. He may be entitled to sue the projectors or promoters in the name of the original allottee for the recovery of the deposit paid on the shares, but could hardly be permitted, if the sale was a valid and legal sale, to resort to the seller.

(d) *Lambert v. Heath*, 15 Law J., N. S. Exch. 297.

(e) *Kempson v. Saunders*, 12 Moore, 49; 4 Bing. 7. *Watkins v. Huntley*, 2 C. & F. 410, n.

for the recovery of the purchase money or any premium he may have paid the latter.

The rule of *caveat emptor* must apply to sales and purchases of scrip and shares, as well as to other commodities bought and sold in the public market. (Ante, 228.)

The discounting of a bill of exchange or promissory note, which afterwards turns out to be a forgery, (*f*) presents no analogy to the sale of scrip in the market. There the parties do not in general intend to speculate on the value of the bill, but the value is assumed as a known quantity, subject to no hazard except the insolvency of the parties whose names appear upon the face of it. But in the case of the sale of railway scrip, it is notorious that the whole transaction is a speculation on the value of the subject matter of the contract, which is subject to a variety of contingencies. We have before seen, in the case of sales and purchases of chattels, that the law does not imply from the mere seller of an article in its natural state, who has no better means of information than the purchaser as to its inherent condition, any warranty or undertaking beyond the ordinary promise that he is not cognizant of any defect materially lowering the marketable value of the goods; and it is apprehended that in the case of sales and purchases of letters of allotment and scrip there is no implied warranty on the part of the vendor that the scheme shall go on and the capital be raised, or that the public announcements respecting it shall be fulfilled. (*g*)

An undertaking by a broker that a third party shall deliver shares by a particular day, is not an undertaking to be answerable for the act or default of another within the Statute of Frauds, and requiring consequently to be authenticated by a note in writing if the third party has not contracted with the plaintiff for the delivery of the shares so as to be himself responsible upon the contract. (*h*)

Of the bankruptcy and dissolution of provisionally registered railway companies.—The recent act of 9 & 10 Vict. c. 28, enables parties who have entered into subscription contracts or agreements for the formation of a railway company to dissolve the company through the medium of a resolution of a majority of three-fifths of the subscribers or shareholders in public meeting assembled. The committee of management or the provisional directors may (s. 2) call this

(*f*) *Jones v. Ryde*, 5 Taunt. 488. As to the stamp on contract for the sale of scrip, see *Knight v. Barber*, 10 Jur. 929.

(*g*) Ante, 228, *Lambert v. Heath*, 15 Law,

J., N. S., Exch. 297. *Price v. Neal*, 3 Burr. 1355. *Shaw v. Holland*, 15 M. & W. 136. *Doyle v. Muntz*, 10 Jur. 914.

(*h*) *Hargreaves v. Parsons*, 13 M. & W. 561.

meeting, or any five shareholders may sign (s. 3) and send a written requisition to the committee or the provisional directors for the calling thereof, and if such committee or directors do not attend to the requisition, and no meeting is holden for six days after it has been left at the company's registered place of business, or has been served personally on a member of the committee, any five shareholders may call the meeting. After service of this requisition the managers cannot enter into any fresh contracts or engagements, or incur any fresh expenditure, or issue fresh shares or scrip, until the meeting has been holden, but must confine themselves to the liquidation of the existing debts and engagements. Provision is made for giving public notice in the gazette of the day and hour of meeting; for the ascertainment of the parties who are to be entitled to be present and to vote as shareholders; for the form of the proceedings, the adjournment of the meeting, and for the taking the sense of the shareholders upon the question of the dissolution. The parties entitled to be present and to vote as shareholders are the actual holders of scrip certificates of shares, (s. 12,) whether they are the original allottees thereof, or the assignees of such allottees, and whatever may be the title by which they hold the same. Each shareholder is entitled to one vote in respect of every share held by him, which may be given either in person or by proxy, and all shareholders producing their scrip, receipts, or certificates of shares are entitled to appoint proxies according to a form given in the act. The attendance of the shareholders at the meeting, and their participation in the proceedings, is not in anywise to increase or alter their several liabilities either at law or in equity.

In addition to the question of dissolution, the meeting is to decide whether such dissolution shall or shall not be taken to be an act of bankruptcy for the purpose of having the affairs of the company wound up under the act passed for "facilitating the winding up of the affairs of joint stock companies unable to meet their pecuniary engagements." If the scrip-holders decide in favour of the bankruptcy, the management of the company and the winding up of its affairs will be taken out of the hands of the committee or directors, and regulated by the last-named statute. (Ante, 538, 539.)

If the company is not dissolved as an insolvent or bankrupt company, the affairs are to be wound up according to the rules applicable to the dissolution of partnership undertakings in general, and as if the undertaking had been dissolved by mutual consent. The dissolution is not to affect the rights of creditors not being shareholders, nor the liabilities upon the existing contracts and engagements.

Three months after the dissolution, a fiat in bankruptcy may be issued against the company on the petition of any creditor or any three members of the previous committee of management, and the company be brought within the provisions of 7 & 8 Vict. c. 111.

Provision is made (s. 31) for contribution as between the members of the committee of management in respect of judgments recovered against any one of them in respect of the debts of the company or the committee. Also for the taxation of the bills of attorneys and solicitors who may have been employed by the company in any capacity whatever. If the meeting does not decide in favour of a dissolution, no new meeting can be called to reconsider the question, or to determine any matter having reference to a dissolution, until after the expiration of six months from the day on which the question was resolved in the negative.

INCORPORATED RAILWAY *and* PARLIAMENTARY WORKS' COMPANIES.

Of the effect of incorporation by act of parliament.—By the 25th section of the Joint Stock Companies' Act, it is enacted, that as soon as any railway or parliamentary works' company shall have obtained its act of incorporation or other act authorizing it to execute its works, or at the time of the coming into operation of such act, according as it may thereby be appointed, all the powers which any such company shall obtain by virtue of the Joint Stock Companies' Act, and all provisions and regulations applying to that act shall cease and determine, except so far as shall be provided by such act of incorporation or other act as aforesaid.

For the purpose of insuring uniformity in the various acts of parliament incorporating joint stock companies, certain general clauses and provisions have been framed by the Companies' Clauses Consolidation Act, (8 & 9 Vict. c. 16,) which are to apply to all joint stock companies incorporated subsequently to the passing of that statute, unless they are excluded by the express terms of the special act. These general clauses and regulations provide for the distribution of the capital of the company into shares numbered in arithmetical progression (s. 6), for the transmissibility of such shares as personal estate (s. 7), and (s. 9) for the registration of all the shareholders, together with the number of shares held by them, in a book to be called the register of shareholders, and for the registration of their addresses and places of residence in another book, called "the shareholders' address book;" also for the issue of certificates of proprietorship of shares to the shareholders under the common seal of the company (s. 11), for the admission in evidence of such certificates (s. 12), and for the renewal of them when destroyed (s. 12).

Of the registration of the subscribers and shareholders under the act of incorporation.—As soon as the act of incorporation has been obtained, a notice is usually issued by the directors and managers requiring all persons holding scrip certificates in the company to transmit them to the secretary, with their names, professions, and residences, in order that they may be registered as shareholders. The directors are not bound to register as shareholders any other parties than those to whom the certificates of shares were originally granted, and whose names appear upon the face of the certificates as the holders of the shares; but it has become the practice to register the actual holders or assignees of the scrip certificates and substitute them in the place and stead of the original subscribers; and the directors have, under the generality of railway acts, a right to accept and register such scrip-holders as proprietors and shareholders in the company. (i)

Extinguishment of the liability of the original subscribers.—Substitution of new shareholders in the place of such original subscribers.—The original subscribers who have executed the ordinary subscription contract under seal, and have covenanted to subscribe a certain sum of money towards the carrying out of the undertaking, can only be released from their liability upon the covenant by the execution of a deed creating a new liability to the company in respect of such subscription on the part of some third party inconsistent with the continuance of the original liability, or by the substitution in the mode authorized and established by the act of incorporation of the liability of a new shareholder and subscriber in the place of that of the original subscriber and covenantor. If the holder of a scrip certificate of shares, being the assignee of the original subscriber, is registered as a shareholder, and the liability imposed by the act of incorporation upon all shareholders to pay up their calls and their several proportions of the subscription due in respect of shares, attaches upon the party so registered, so that he is thenceforth liable to be sued by the company for such subscriptions and calls, there is a substitution by consent of the company, and by the authority of parliament, of the liability of such new shareholder in the place and stead of the original subscriber, which will operate as an extinguishment of the liability of the latter (ante, 812—817): but if the register of such assignee of the original subscriber is not warranted or authorized by the terms of the subscription contract and the act of incorporation, and he does not legally become a shareholder under the act, although his name appears

(i) *Lond. Grand Junc. Rail. Co. v. Freeman*, 2 Rail. Cas., 508; 2 M. & Gr. 606.

upon the registry, there is no substitution of the one for the other, and no extinguishment of the liability of the original subscriber upon his covenant.

Transfer of shares and stock after incorporation.—The Companies' Clauses Consolidation Act provides (subject to the regulations that may be contained in the special act of incorporation) for the transfer of shares by deed duly stamped, setting forth the consideration for the transfer according to a form given in the schedule of the act; for the registry of such transfers in a book to be called the register of transfers; for the payment of calls and subscriptions due in respect of such shares (ss. 14—28); and for the forfeiture of the shares in case of the nonpayment of calls (ss. 29, 35) in terms similar to those of the Joint Stock Companies' Act. Provision is also made (ss. 54, 56) for the consolidation of the shares into stock for the transfer and registry of such stock, and the payment of the dividends that may accrue thereon.

Transmission of shares by marriage, death, bankruptcy, &c.—When the interest in any share has passed by death or marriage, or bankruptcy or insolvency, such transmission must (s. 19) be authenticated by a declaration of the circumstances, signed by some credible person before a justice of the peace, or a master extraordinary in chancery, and be left with the secretary, who is then to register the party entitled under such transmission in the registry of shareholders. If the transmission results from the marriage of a female shareholder, the written declaration is to contain (s. 19) a copy of the register of the marriage, or the particulars of the celebration thereof, and assert the identity of the wife with the holder of the share, and if it results from death, the probate of the will of the deceased shareholder, if any exists, and if not, the letters of administration, or an official extract therefrom, are to be produced to the secretary, together with the declaration at the time the transfer is required to be made.

The company is not to be bound (s. 20) to see to the execution of any trust to which the shares may be subject, and when a share stands in the names of several parties, the receipt of any one of such parties is to be a sufficient discharge to the company for money due in respect of such share.

Provision is made in the Companies' Clauses Consolidation Act for the regulation of the meetings of the shareholders, and of the business to be transacted at such meetings, for the manner of voting and the appointment of proxies (ss. 66—80), for the appointment, qualification, and rotation of directors (ss. 81—88), and for the supply of occasional vacancies in the body of directors.

Of the LIABILITY ex contractu of the DIRECTORS and SHAREHOLDERS after INCORPORATION.

Liability of the directors.—By the Companies' Clauses Consolidation Act, it is enacted (s. 100) that no director, by being party to any contract or other instrument on behalf of the company, or otherwise lawfully executing any of the powers given to the directors, shall be liable to be sued by any person whomsoever; and the bodies, or goods, or lands of the directors shall not be liable to be taken in execution by reason of any contract signed or executed by them in the execution of any of their powers as directors; and such directors, their heirs, executors, &c., are to be indemnified out of the capital of the company for all payments made or liability incurred in respect of any acts done by them, and for all losses, costs, and damages, which they may incur in the execution of the powers granted to them; and the directors for the time being may apply the existing funds and capital of the company for the purposes of such indemnity, and may, if necessary for that purpose, make calls of the capital remaining unpaid.

This section of the statute, which is affirmatory only of the ordinary doctrines and principles of the law of principal and agent, protects the directors from liability so long only as they act within the scope of their power and authority as directors, and bind the company by their contracts. If they do not strictly pursue the powers given them, and fail to bind the company, they are then individually responsible for the fulfilment of the engagements they have entered into. (Ante, 384, 385.) They are responsible also for gross negligence and misconduct in the administration of the corporate funds, and the management of the business intrusted to them, and cannot shelter themselves from the ordinary consequences resulting from breaches of trust and neglect of duty under the protecting clause of the act of parliament. They cannot be said to be lawfully executing the act when they are misbehaving themselves.(k)

Of the liability for calls.—The word shareholder in all provisions contained in special acts of parliament is (s. 21) to extend to and include the personal representatives of such shareholder, and the company is to be at liberty (s. 22) from time to time to make calls upon the shareholders, provided twenty-one days' notice be given of such calls; and if any shareholder do not pay the amount of a call to which he is liable, he is (s. 23) to pay interest in respect thereof. The company is empowered to sue in respect of such calls, and provision is made (s. 26) for the form of the

(k) Post, chs. 24, 25, 26, 1 Y. & C. 326; 4 Russ. 562; 4 Sim. 420; 2 Atk. 400.

declaration in such action, and for the amount and nature of the evidence to be given at the trial.

The production and register of the shareholders is to be *prima facie* evidence of the defendant being a shareholder, and of the number and amount of his shares.

By the 15th section it is enacted, that when a deed of transfer has been executed, it shall be delivered to the secretary and kept by him; and the secretary shall enter a memorial thereof in the register of transfers, and endorse such entry on the transfer deed, and, on demand, either deliver a new certificate to the purchaser, or make and sign an indorsement of the transfer on the back of the old certificate, which indorsement is to have the same effect as a new certificate, and until the deed of transfer has been so delivered to the secretary, the vendor of the share is to continue liable for calls made on the share. And no shareholder is to be entitled (s. 16) to transfer his share after any call has been made in respect thereof, until he shall have paid all calls for the time being, due on every share held by him.

The general scope of the railway acts is to treat the shareholder who takes by transfer, as identified with his share, and as having nothing to do with the company either with respect to rights or liabilities before he becomes or after he ceases to be a shareholder, the express provisions of the acts giving remedies by action, by forfeiture, and by withholding dividends against those who hold the shares at the time the call is payable, and the absence of express provisions continuing the liability of a shareholder, of whose transfer a memorial is entered, show that the acts do not consider the debt as arising till the day appointed for payment. "The duty of a shareholder who takes by transfer to pay a call, is the creature of the act: the act requires the payment to be made at the time appointed by the directors; at that time, and not before, the duty arises, and it is a duty which by the terms of the act is cast on the owner for the time being." (1)

The shares are made subject to forfeiture in case of the non-payment of calls, and may be sold by the company. (ss. 29—35.)

Mandamus to make calls.—The Court of Queen's Bench will, under certain circumstances, issue a mandamus to an incorporated company, directing them to make calls on the shareholders. In the case of *the Queen v. the Victoria Park Company*, Lord Denman observed, in deliver-

(1) *Tindal, C. J., Aylesbury Rail. Co. v. Mount*, 5 Sc. N. B. 147; 2 Rail. cas. 679; 8 4 M. & Gr. 651; 2 M. & Gr. 606; 2 Rail. cas. 504, 869, 872.
Sc. N. B. 586, s. c. in error; 2 Dowl. N. S. 143;

ing the judgment of the court, that if a corporation had a power of creating a future corporate property, from time to time, out of the private assets of its individual members, and contracts were made with the body corporate on the faith that an honest exercise would be made of such power when necessary, and it were clearly established that the members were evading the payment of their debts, and the due satisfaction of judgments recovered against them, on the ground that they had no corporate assets actually in possession, the Court of Queen's Bench would not perhaps go beyond the principle which regulates its extraordinary interposition by mandamus, if it compelled them to exercise the power of making calls with which the legislature had trusted them, and so put themselves in the possession of funds to answer the demands of their creditors.(*m*) As the latter have, however, by all the more recent acts of incorporation, power to proceed against shareholders who have not paid up their calls, in case the property of the company is insufficient to meet their demands, (post 551,) the proceeding by mandamus will generally be found to be unnecessary.

Of the power of the directors and committees of the directors to bind the Company.—The directors are authorized to appoint a select number of their body, as a committee, to do any acts relating to the affairs of the company, which the directors themselves could do; and the directors and committees have a general power of meeting and adjourning for the transaction of business. The prescribed quorum must be present at every meeting; a chairman must be appointed, and all questions determined by a majority of votes; and in case of an equal division of votes, the chairman is to have the casting vote. (ss. 92—96)

These committees and the directors are clothed with a general power of binding the company both by deed under the common seal, and by simple contract, without the use of the common seal. Any powers which may be granted to the committee to make contracts, and the power of the directors to make contracts on behalf of the company, may be lawfully exercised as follows:—With respect to any contract which if made between private persons would be by law required to be in writing and under seal, the committee or the directors may make such contract on behalf of the company, in writing and under the common seal of the company, and in the same manner may vary and discharge the same. With respect to any contract which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, the com-

(*m*) *The Queen v. Victoria Park Company*, 1 Ad. & E. n. s. 292.

mittee, or the directors, may make such contract on behalf of the company, in writing, signed by such committee, or any two of them, or any two of the directors, and in the same manner may vary and discharge the same; and with respect to any contract, which, if made between private persons, would by law be valid, although made by parol only, and not reduced into writing, the committee or the directors may make such contract on behalf of the company, by parol only, without writing, and in the same manner may vary and discharge the same. (s. 97.) And all contracts made according to the provisions of the statute in that behalf are to be binding upon the company, and their successors, and all the parties thereto, their heirs, executors, &c., as the case may be, and on any default in the execution of any such contract, either by the company or any other party thereto, such actions and suits may be brought either by or against the company as might be brought had the same contracts been made between private persons only. (s. 97.)

All acts also done by any meeting of the directors, or by any person acting as director, are to be valid, notwithstanding that it may afterwards be discovered that there was some defect in his or their appointment, or qualification.

Execution against the shareholders.—By the 36th section it is enacted, that if any execution either at law or in equity, shall have been issued against the property or effects of the company, and there cannot be found sufficient property of the company whereon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not paid up; but it is provided that no such execution shall be issued against any shareholder except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged; and upon such motion the court may order execution to issue accordingly, and for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid up upon their respective shares, any person entitled to any such execution is to be at liberty to inspect, at all reasonable times, the register of shareholders without fee. And it is provided (s. 37) that if by means of any such execution any shareholder shall have paid any sum of money beyond the amount then due from him in respect of calls, he shall forthwith be reimbursed such additional sum by the directors out of the funds of the company.

SECTION II.

CORPORATIONS AT COMMON LAW.

Incorporation at common law.—The sovereign, by virtue of his or her prerogative, exercises the power of creating that peculiar species of entity called a corporation, which may be either sole or aggregate, ecclesiastical or lay, and is called into existence through the medium of a charter of incorporation, which gives it a name, and sometimes prescribes the terms and conditions of its existence. “The name is, as it were, the very being of the constitution, for though it is the will of the king that erects them, yet the name is the knot of their combination, without which they cannot perform their corporate acts, for it is no body to plead and be impleaded, to take and give until it hath gotten a name.” (a)

Corporations aggregate.—The effect of a general and unqualified incorporation of two or more persons, at common law, is to create an aggregate body politic, or legal entity, with rights and liabilities completely separate and distinct from the individual existence, rights, and liabilities of its members. (b) This legal entity is, as it has been sagely remarked, without soul or conscience, and without any visible or outward form, and cannot, therefore, be either excommunicated, or outlawed, or arrested. It could only in former times be compelled to answer in an action at law by a distringas against its goods and chattels, and could only appear by attorney, made under its common seal, and if it had neither lands nor goods there was no way of bringing the corporate body either into a court of law or a court of equity. Its debts are, at common law, its own debts, and not the debts of the individual members thereof, and the latter, consequently, are not answerable either in their persons or property for the corporate debts, and if there are no corporate effects whereon to levy judgments and executions obtained against the body corporate, the creditors must go unpaid. (c) Amongst the powers and privileges possessed by the body corporate from the mere act of incorporation, and without any special provision or stipulation in the charter, is the power of making bye laws for the government of the body politic, subject to the laws of the realm and subordinate thereto, and the power (in the case of ancient

(a) Bnc. Abr. (CORPORATIONS.) (C. .)

(b) Bro. Abr. Bnc. Abr. (CORPORATIONS.)

(c) Bro. Abr. fol. 183—186, fol. 265, pl. 82.
Edmunds v. Brown, 1 Lev. 237.

Cooch v. Goodman, 2 Ad. & E. N. S. 580.

corporations) of electing its own members at corporate meetings, and appointing its own officers; of suing and being sued in the corporate name; of holding and enjoying property in such name; of purchasing and parting with its possessions, and of acting and speaking through a common seal, which is said to be "its hand and mouth-piece."

Liability ex contractu of the BODY CORPORATE.—The general rule is that all contracts to be binding upon the body corporate at common law, must be made in writing in the corporate name, and authenticated under the common seal. If the contract is made in the name of the head of the corporation, or in the names of the individual members thereof, the corporate body will not be bound by the contract although the common seal has been affixed to it. "If an abbot and all his monks, by their proper names, and not by the name of their incorporation, make an obligation under their common seal, this shall not bind their successors, and the law is the same with respect to a mayor and commonalty." (d)

The affixing of the common seal to the resolutions and contracts of the corporation, must be the act of a majority of those who were present at a regular corporate meeting. Where no special provision is made by the charter concerning the performance of corporate acts, the whole are bound by the acts of such majority, whether the number present at the meeting was a majority of the whole body or not. "Wherever a certain number are incorporated, a major part of them may do any corporate act; so if all be summoned, and part appear, a major part of them that appear may do a corporate act though nothing be mentioned in the charter of the major part. This is the common construction of charters." (e) The business of the corporation is generally transacted on "charter days," or at specific times, well known to all the members of the corporation, and when that is the case, no notice or summons of the intended meeting need be given to the particular members. But when corporate meetings are held out of the ordinary course, or if business of an unusual or extraordinary character is intended to be transacted at such meetings, notice should be given to the different members of the corporation, in order that they may have an opportunity of being present.

Infancy in the mayor, bailiff, or other head of a corporation, or any incapacity to contract on the part of individual members thereof, does not in any way affect the liability of the corporation in respect of corporate acts. (f)

(d) Bro. Abr. CORPORATIONS, pl. 31. 15 2 Atk. 213.
E. 4. 1. (f) Bro. Abr. Corpor. 63, 1 Kyd. 312.
(e) Ld. Hardwicke, *Attorney General v. Day*, *Rex v. Carter*, 1 Cowp. 225.

An act done by the members of a municipal corporation in the absence of the head, does not bind them. Thus if a bond be given by the commonalty in the absence of the mayor, the body corporate is not bound. But if a mayor *de facto*, together with such other members of the corporation as are empowered to bind the whole by their act, put the common seal to an obligation, this shall bind the corporation, though he be not *de jure* mayor; for being in fact appointed to the office, and permitted to act in it by the corporation who might have removed him, all judicial and ministerial acts done by him are valid. (g)

If the common seal has not been affixed to the contract, the general rule is that the contract is not the contract of the corporation. (h) But this rule has been subjected to numerous exceptions, and has been almost superseded in practice, as we have already seen, (ante, 291, 292,) in the case of trading corporations, the end and object of whose existence could never be accomplished if every corporate act was required to be authenticated under the common seal. It has been held that a corporation can make a promise as well as a private individual in respect of the proper and legitimate business of the corporate body, and may be sued thereon *in assumpsit*. It is responsible for the price of goods ordered and received in the exercise of its trade, (i) for the wages of servants necessarily employed in the discharge of its functions, and for the payment of bills and notes, drawn or made in the corporate name, when the drawing or making of such securities is necessary for the attainment of the objects, and the exercise of the trade and calling, for which the corporation was established. (Ante, 292).

A municipal corporation, also, may transact trifling matters of business, and enter into such ordinary contracts as are of constant recurrence, and the making of which form part of their customary and usual functions, without the employment of their common seal. They may hire the ordinary servants of the corporation, such as a butler, cook, bailiff, &c., and may contract for the purchase of trifling articles for their use without deed. "The general rule of law is, that a corporation contracts under its common seal: as a general rule, it is only in that way that a corporation can express its will, or do any act. That general rule has, however, from the earliest traceable periods, been subject to exceptions, the decisions as to which furnish the principle on which they have been established, and are instances

(g) Bro. Abr. CORPORATIONS, pl. 63.

(h) Bro. Abr. CORPORATIONS, pl. 47, 49, 50, 56; 1 Roll. Abr. 514.

(i) *Beverly v. Line. Gas. Co.*, 6 Ad. & R. 829.
Church v. Imp. Gas. Co. ib. 846.

illustrating its application, but are not to be taken as so prescribing in terms the exact limit, that a merely circumstantial difference is to exclude from the exception. This principle appears to be, convenience amounting almost to necessity. Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed; hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions: on the same principle stands the power of accepting bills of exchange, and issuing promissory notes, by companies incorporated for the purposes of trade, with the rights and liabilities consequent thereon."(*k*)

"If the head of a corporation, by the intervention of a servant, buys certain things for the use of a corporation, which are actually applied to their use, they are bound by this contract, and an action may be maintained against them after the change of the head, in whose time the purchase was made. So, if the regular servant of the corporation make a purchase, and apply it to the use of the corporation, it would seem that the corporation are bound: but in both these cases, the plaintiff must aver in his declaration that the things purchased came to the use of the corporation."(*l*) The head of a municipal corporation gave an oral order for weights and measures, which were sent to him, and were afterwards examined in the jury-room at the Town-hall, at a full meeting of the corporation, and approved, accepted, and used by the corporate body, and it was held, that this was a recognition of the contract entered into by the mayor, and that the corporation was responsible for the price of the goods so ordered.(*m*)

If a municipal corporation has wrongfully got possession of the money of a stranger, or the money of one of its own members, the law raises an implied promise from the corporate body to refund the amount, just the same as in the ordinary case of the receipt of money by a private individual, which the latter has no right in conscience or equity to retain. "If the corporation have helped themselves to another man's money, it would be absurd to say that they must bind themselves under seal to return it."(*n*)

But in all matters of consequence and importance, and in respect of acts

(*k*) *Ld. Denman, C. J., 6 Ad. & E. 846; Rolfe, B. 6 M. & W. 822.*

(*l*) 1 Kyd. 313, 314, citing the case of the college at Cambridge; *Longo Quinto*, (5 Ed. 4,) 70—74.

(*m*) *De Grave v. Mayor, &c., of Monmouth*, 4 C. & P. 111.

(*n*) *Ld. Denman, C. J., Hall v. Mayor, &c., of Swansea*, 5 Ad. & E. n. s. 547; 13 Law J. n. s. (Q. B.) 112.

and contracts not coming within the scope of its ordinary every day functions, the corporation is not bound by the act done, unless it is a corporate act authenticated by writing under the common seal. "The rule of law requiring contracts entered into by corporations to be generally entered into under seal, is by no means a rule of a merely technical nature, which it would be safe to relax. The seal is required as authenticating the concurrence of the whole body corporate. If the legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature, or otherwise, then undoubtedly the adding a seal would be matter purely of form and not of substance. Every one becoming a member of such a corporation knows that he is liable to be bound in his corporate character by such an act, and persons dealing with the corporation know that by such an act the body will be bound. But, in other cases, the seal is the only authentic evidence of what the corporation has done, or agreed to do. The resolution of a meeting, however numerous attended, is, after all, not the act of the whole body. Every member knows he is bound by what is done under the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times. It is no such thing: either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation; and the attempt to get rid of the old doctrine by treating as valid, contracts made with particular members, and which do not come within the exceptions which have been adverted to, might be productive of great inconvenience." (o)

Where, therefore, particular members of a municipal corporation, at a meeting of the body corporate, caused a resolution to be entered in the corporation books for the payment of 500*l.* out of the corporation funds, for the pulling down and altering the situation of a house, and for the making of alterations and improvements within the borough, and the alterations and improvements were made on the faith of this resolution, it was held that the body corporate was not bound thereby, as it had not been made under the common seal. (p)

At a meeting of the town council of a municipal corporation, a resolution was entered in the corporation books, to the effect that the salary of the town clerk should be increased from 4*l.* per annum to 100*l.* per annum,

(o) *Bolfe, B.*, 6 M. & W. 823.

(p) *Mayor, &c., of Ludlow v. Charlton*, 6 M. & W. 815.

and it was held that the corporate body was not bound by this resolution, as it had not been made under the common seal. (q)

The guardians of a union, who were a corporate body by statute under the direction of the Poor Law Commissioners, entered into a contract under their common seal with the plaintiff, for the making of a survey and map of one of the parishes comprised in the union for the sum of 500*l.*, which contract was duly fulfilled on both sides. Subsequently, in consequence of a reduced plan being directed to be made by the assistant to the commissioner, the plaintiff prepared an outline map on a reduced scale, which was received and used by the guardians, but no contract was entered into by them under their common seal to pay the price thereof; and it was held that they were not responsible in their corporate capacity for the payment of this outline map, inasmuch as the preparing of a plan in order to have a parochial assessment made, was no part of the duty of the guardians, and was not essential for the carrying out of the purposes or objects for which they were incorporated. "The defendants were incorporated," observes Lord Denman, "for the purpose of managing and conducting the relief and maintenance of the poor within several parishes formed into a union, the expenditure of the money collected for those purposes is entrusted to them, but they have nothing to do with making rates on the respective parishes, or collecting them when made. The plan in question was ordered by the Poor Law Commissioners on the representation of the defendants, at the request of the parish of St. Clement Danes. The plan was wanted in order to enable a fair and correct estimate to be made of the net value of the parish. The other parishes of the union had nothing to do with it, nor were in any way benefited by it; so that the making of the plan cannot in any way have been incident to the purposes for which the defendants were incorporated." (r)

"The appointment of an attorney to conduct important suits affecting the rights and property of the corporation cannot be considered a trifling matter, nor is it of such frequent occurrence, or of such immediate urgency, as to render it inconvenient to postpone it until the common seal of the corporation can be affixed to the retainer. Still less can it be considered that the retainer of an attorney falls within the principle of the decisions relating to contracts made by corporations established for trading purposes. As regards the annual appointment of an attorney by the corporation of

(q) *The Queen v. Mayor, &c., of Stamford*, 6 Ad. & E. n. s. 433. As to orders for the payment of money out of the borough fund, *The Queen v. Mayor, &c., of Warwick*, 15 Law J., n.

s. (Q. B.) 306.

(r) *Paine v Guardians of the Strand Union*, 10 Jur. (Q. B.) 308.

London without seal, that appointment is *recorded*; and in the mayor of Thetford's case,^(s) Holt, C. J., explained the ground upon which such appointment is binding. He there said, and the rest of the court concurred with him, that though a corporation cannot do an act in pais without their common seal, yet they may do an act *upon record*, and that is the case of the city of London every year, who appoint an attorney by warrant of attorney in this court, without either sealing or signing; and the reason is, because they are estopped by the record to say it is not their act."^(t)

Of the dissolution of corporations.—If all the members of an aggregate corporation die, the body politic is dissolved, but it may be kept on foot by the constant choice and introduction of new members, as the existing members die off.^(u) It may be dissolved, also, by a surrender of the charter to the king, or by a forfeiture of the charter in consequence of a non-compliance with some express or implied term or condition of its existence.^(x)

SECTION III.

PARTNERSHIPS UNDER LETTERS PATENT.

We have already seen that "the great distinction in contemplation of law, between common partnerships and corporations is, that in the first, the law looks to the individuals of whom the partnership is composed, and knows the partnership no otherwise than as being such a number of individuals; while in the second it sees only the creature of the charter, the body corporate, and knows not the individuals. Hence, on a judgment against a corporation, execution can only be levied against the corporate

(s) 1 Salk. 192; 3 Salk. 103; 2 Raym. 848.

(t) Tindal, C. J. *Arnold v. Mayor of Poole*, 5 Sc. N. R. 776; 4 M. & Gr. 860.

(u) Roll. Abr. 514; 10 Co. 30 b.

(x) As to the dissolution, suspension, and re-incorporation of corporate bodies by the crown, *Mayor, &c., of Colchester v. Brooks*, 15 Law J. N. S. (Q. B.) 173.

effects ; or supposing a trading corporation to become wholly insolvent, the individual members and proprietors will only lose their stock or share in the capital of the body corporate, and do not become answerable for the debt in their individual capacities." We have also seen that "it is far otherwise with the members of unincorporated partnerships who may be made answerable for the debts of the firm, to use an expression of the Lord Chancellor, 'even to their last shilling, and their last acre.' "(y)

It was this unbounded liability, in common with other inconveniences attending general trading partnerships composed of a large number of partners, that induced associations formed for trading purposes to apply to the crown for a charter of incorporation. Various companies and associations, guilds, and fraternities, were at a very early period of our commercial history incorporated for trading purposes by the crown, and as trade and commerce increased, the number of these trading corporations increased, and many of them failing in their trading speculations and becoming insolvent, the immunity enjoyed by the members from liability in respect of the debts of the company was found to be greatly abused to the prejudice of the public. The creditors could obtain no satisfaction of their claims against the body corporate, although the individual members thereof were rolling in wealth ; and many honest tradesmen who had supplied their goods, and advanced their money to the corporation upon the aggregate credit of the individual members thereof, known to them, although not known to the law, found, when they proceeded against the company, that there was no property which they could attach, and they got, consequently, "nothing but a skeleton picked clean by the ants."

These abuses of corporate privileges naturally caused great reluctance on the part of the crown to grant charters of incorporation ; and an attempt was made to secure for trading associations such corporate privileges as were useful and necessary for them to possess, accompanied with a proper amount of individual responsibility ; and it was accordingly enacted, by 7 Geo. 4, c. 46, that in any charter thereafter to be granted for the incorporation of any company or body of persons, it should be lawful to provide that the members of such corporation should be individually liable in their persons and property for the debts, contracts, and engagements of the corporation, and to such extent and subject to such regulations and restrictions as the sovereign should deem fit and proper, and as should be declared and limited in and by such charter.

(y) *George on Joint Stock Companies*, 29.

This act has been repealed by 7 Wm. 4, and 1 Vict. c. 73, which enables the crown, by letters patent under the great seal, to grant to any company or body of persons associated together for trading or other purposes, and to the heirs, executors, administrators, and assigns, of any such persons, although not incorporated by such letters patent, any privilege or privileges which, according to the rules of the common law, it would be competent to her Majesty, her heirs and successors, to grant to any such company or body of persons, in and by any charter of incorporation.

It is enacted also, (s. 3,) that in any such letters patent it shall be lawful for the crown, either expressly or by a general or special reference to the act, to provide that all suits and proceedings by or on behalf of such company or association, or any persons as trustees for the company, against any persons, whether bodies politic or others, and whether members or not of the company, shall be commenced and prosecuted in the name of one of two officers appointed to sue⁽²⁾ and be sued in behalf of the company, and registered in the manner provided by the act; and that all suits and proceedings against the company shall be commenced and prosecuted against one of such officers; or if there shall be no such officer for the time being, then against any member of the company.^(a)

And by the fourth section of the statute it is enacted, that it shall be lawful for the crown, in and by such letters patent, to declare and provide that the members of the company, or body of persons so associated together for trading purposes, shall be individually liable in their persons and property for the debts, contracts, and engagements of the company, to such extent only per share as shall be declared and limited by the letters patent: such liability to be enforced in the manner provided by the act. Provision is then made for the form and execution of a deed of partnership by the members and shareholders of the company, dividing the capital into shares, and setting forth the name and purpose of the company; the date of its commencement; the names, and styles of the members thereof; the place of carrying on the business; and containing an appointment of officers to sue and be sued in the name of the company (s. 5). Provision is then made for the making of returns to the Enrolment Office of the Court of Chancery of the number of the shares in the company, of the amount and extent to which, by the letters patent, each share is to render the holder thereof responsible; of the names and places of abode of such holders of shares; of all transfers of shares and changes in the shareholders, and of divers other matters connected with the constitution and

⁽²⁾ Ante, 289, 290.

^(a) *Steward v. Dunn*, 12 M. & W. 655.

Timms v. Williams, 3 Ad. & E. n. s. 413.

organization of the company.(b) By the 24th section of the act, provision is made for the execution against the persons or property of individual shareholders, of judgments and decrees obtained against the company, within the limits prescribed by the letters patent; and it is enacted, that where the extent per share of the liability of the individual member shall have been limited by the letters patent, no execution shall be issued against any existing or former member of the company,(c) for a greater sum than the residue, if any, of the amount for which, by virtue of the letters patent, such member shall be liable in respect of the shares then or theretofore held by him, after deducting therefrom the amount, if any, which shall appear by the register to have been advanced and paid in respect of such shares, under and by virtue of any former execution, and not repaid at the time of issuing such subsequent execution.

Notice of the application to the crown for letters patent is required to be inserted three times in the *London Gazette*, and in one or more of the local papers of the district where the company's place of business is established. Companies and partnerships consequently established in this way under letters patent, are of a mixed character, partaking in some respects of the incidents and peculiarities of a corporation, and in others of an ordinary partnership.

SECTION IV.

JOINT STOCK BANKING COMPANIES.

Of the creation and establishment of Joint Stock Banking Companies.—By 7 and 8 Vict. c. 113, s. 1, it is enacted, that it shall not be lawful for any company of more than six persons to carry on the trade or business of bankers in England, under any agreement or covenant of co-partnership, unless by virtue of letters patent to be granted by her Majesty.

(b) *Cloves v. Brettel*, 11 M. & W. 461. *Bradley v. Eyre*, ib. 432; ib. 452, 456.

(c) *Estelle v. Lund*, 1 D. & L. 607. *Rans-*

ford v. Bosanquet, 2 Ad. & E. n. s. 972. *Crellin v. Calvert*, 14 M. & W. 11. *Powles v. Page*, 10 Jur. 526.

The act provides (ss. 44, 45) for the remodelling of existing banking companies, and the reconstruction and incorporation of them under letters patent, to be granted by the crown. And as regards all future companies afterwards to be formed, it is enacted, (s. 2,) that before beginning to exercise the business of bankers, every such company shall present a petition to her Majesty in council, praying that her Majesty will be graciously pleased to grant to them letters patent under that act; which petition is to be signed by seven at least of the company, and is to set forth the following particulars; viz. the names and additions, and residences, of all the partners of the company—the proposed name of the bank—the name of the street, square, or the local description of the place where the business of the bank is to be carried on—the proposed amount of the capital stock not being in any case less than one hundred thousand pounds, and the means by which it is to be raised—the amount of capital then paid up, and where and how invested—the proposed number of shares in the business—and the amount of each share, not being less than one hundred pounds each.

Every such petition is to be referred to the committee of privy council for trade, and her Majesty is empowered, as soon as the Lords of the Committee have reported that the provisions of the act have been complied with, to grant letters patent incorporating the company.

The deed of partnership of every such company must be prepared according to a form to be approved by the Lords of the Committee for trade, and must contain certain provisions and particulars specified and set forth in the fourth section of the act, and must be executed by the holders of at least one-half of the shares on which £10 per cent. has been paid up. This deed is to be annexed to the petition, and the provisions of it are to be set forth in the letters patent.

INCORPORATION *of the COMPANY.*—By the sixth section of the act, her Majesty is empowered to grant, by the letters patent, that the persons by whom such deed of partnership shall have been executed, and all other persons who shall thereafter become shareholders in the banking business, their executors, administrators, successors, and assigns respectively, shall be one body politic and corporate, by such name as shall be given to them by the letters patent, for the purpose of carrying on their banking business, and by that name shall have perpetual succession and a common seal, and have power to purchase and hold lands of such annual value as shall be expressed in such letters patent. But before the company begins to carry on business as bankers, and within three months after the grant of the letters patent, an account or memorial is to be made out in the

form prescribed by the act, of the true title or firm of the company, the names and places of abodes of the members, directors, and managers thereof, the name or firm of every bank established by the company, and of every town or place where its business is carried on, and a new memorial of the same particulars in the form prescribed by the act (s. 18) is to be made every year between the 8th of February and the 25th of March, and oftener if occasion requires, and is to be filed and kept in the stamp office for the inspection of the public. (ss. 16, 17.) And the persons whose names appear in the last delivered memorial, and their legal representatives are to be liable (s. 21) in all legal proceedings, as the existing shareholders of the company, and are entitled to be reimbursed as such out of the funds or property of the company for losses sustained in consequence thereof.

The transfer of shares is regulated by rules and provisions similar to those of the Joint Stock Companies' Act; (s. 54, ante, ch. 19,) and the authentication of the transmission of the interest in the shares by death, marriage, bankruptcy or insolvency, is required to be made in a way similar to that prescribed in the Companies' Clauses Consolidation Act, (ante, 555.) Provision is made for the forfeiture and sale of shares in case of the non-payment of calls. (s. 37—42.) If any money be payable to any shareholder, being a minor, idiot, or lunatic, the receipt of the guardian of such minor, or of the committee of such idiot, or lunatic, is to be a sufficient discharge (s. 29) to the company for the same. The company moreover is not bound to see to the execution of any trust, (s. 30,) whether express, implied, or constructive, to which any of the shares may be subject, and the receipts of the party in whose name any such share shall stand in the books of the company, is to be a sufficient discharge to the company for any dividend or other sum of money payable in respect of the share, notwithstanding any trusts to which such share may then be subject, whether the company have had notice of such trusts or not; and the company is not bound to see to the application of the money paid on such receipt.

Liabilities of the shareholders.—It is also provided (s. 8) that no action or suit, by or against the company, shall be in anywise affected by reason of the plaintiff or defendant therein being a shareholder or former shareholder of the company; but any such shareholder, either alone or jointly with another person, as against the company, or the company as against any such shareholder, either alone or jointly with any other person, shall have the same action and remedy in respect of any cause of action or

suit whatever, which such shareholder or company might have had, if such cause of action or suit had arisen with a stranger.

It is moreover provided and enacted, (s. 7,) that notwithstanding such incorporation, the several shareholders for the time being in the said banking business, and those who shall have been shareholders therein, and their several executors, administrators, successors and assigns, shall be and continue liable for all the dealings, covenants, and undertakings of the said company, subject to the provisions of the act, as fully as if the said company were not incorporated.

Bills of exchange and promissory notes.—All bills of exchange and promissory notes made, accepted, or endorsed, on behalf of the company, may be made, accepted, or endorsed (as the case may be) in any manner provided by the deed of partnership, so that they be signed by one of the managers or directors of the company, and be by him expressed to be made, accepted, or endorsed on behalf of the company, but nothing contained in the act shall be deemed to make any manager or director liable upon any such bill of exchange, or promissory note, to any greater extent, or in a different manner, than upon any other contract signed by him on behalf of any of the company, and every such company on whose behalf any bill or note shall be so made, accepted, or endorsed, may sue and be sued thereon as fully as on any contract made under their common seal.

Payment of calls.—The directors may from time to time make such calls of money upon the shareholders, in respect of the amount of capital subscribed by them, as they shall think fit; and whenever execution upon any judgment against the company shall have been taken out against any shareholder, the directors, within twenty-one days next after such notice shall have been served upon the company, of any money paid by such shareholder, his executors or administrators, towards satisfaction of such judgment, shall make such calls upon all the shareholders as will be sufficient to reimburse to such shareholder, his executors, or administrators, the money, costs, and expenses so paid by him, and shall apply the proceeds of such calls accordingly; and every shareholder shall be liable to pay the amount of every call in respect of the shares held by him, to the persons and at the times and places from time to time appointed by the directors. And (s. 82) if before or on the day appointed for payment, any shareholder do not pay the amount of any call to which he may be liable, such shareholder shall pay interest for the same at the rate of 5*l.* per cent. per annum from the day appointed for payment to the time of actual pay-

ment. And (s. 33) shall be liable to an action at the suit of the company, for the recovery of the amount and interest. The act then provides for the form of the pleadings in such actions, (s. 34,) and the mode of proof (s. 35). And also for the forfeiture of shares in case of the non-payment of calls as previously mentioned.

Execution against the shareholders.—Every judgment, decree, or order of any court of justice in any proceeding against the company may (s. 9) be executed against, and has the like effect on, the property and effects of the company, and also (subject to the provisions of the act) upon the person, property, and effects of every shareholder and former shareholder thereof, as if every individual shareholder and former shareholder had been by name a party to such proceeding. After judgment, moreover, has been obtained, and execution issued against the property and effects of the company, and such judgment remains unsatisfied, execution may be issued (s. 10) against the person, property, and effects of any shareholder; and if satisfaction of such judgment shall not then be obtained, against the person, property, and effects of any person who was a shareholder of the company at the time when the cause of action against the company arose. But it is provided, that no person having ceased to be a shareholder of the company shall be liable for the payment of any debt for which judgment shall have been obtained, for which he would not have been liable as a partner in case a suit had originally been brought against him for the same, or for which judgment shall have been obtained after the expiration of three years from the time when he shall have ceased to be a shareholder; nor is the plaintiff in any case to recover any other or greater sum than might have been recovered if the act had not been passed.

Contribution between present and former shareholders.—Every shareholder, against whom any execution on a judgment recovered against the company shall have issued, is to be reimbursed (s. 11) out of the property and effects of the company the full amount necessarily paid by him to get rid of such execution, and in default thereof by contribution from the other shareholders. And (s. 12) if any such execution be issued against any present or former shareholder of the company, and if, within fourteen days next after the levying of such execution, he is not reimbursed on demand out of the property and effects of the company, the money, costs, and expenses necessarily paid or incurred by him in consequence of the execution, such shareholder, his executors or administrators, is to have execution against the property and effects of the company

in satisfaction of the amount so paid, which amount is to be ascertained by one of the masters or other officer of the court out of which the execution shall have issued, and is to be recovered (s. 13) by execution issued by leave of the court, or of a judge of the court, in which the judgment shall have been obtained in a mode similar to that provided by the 68th section of the Joint Stock Companies' Act as previously mentioned, (ante, ch. 19). And it is further enacted, (s. 14,) that if the shareholder be not by such means fully paid and satisfied, he shall be entitled to divide the amount thereof, or so much thereof as he shall not have been reimbursed, into as many equal parts as there shall then be shares in the capital stock of the company, (not including shares then under forfeiture,) and every shareholder for the time being of the company, and the executors or administrators of every deceased shareholder are in proportion to the number of shares which they may hold in the company, to pay one or more of such parts upon demand to the shareholder against whom such execution shall have been issued, or to his executors or administrators, and upon neglect or refusal so to pay, such shareholder, his executors or administrators, may sue for and recover the same. And it is further provided, (s. 15,) that if the shareholder or former shareholder against whom any such execution shall have issued, his executors or administrators shall, by reason of the bankruptcy or insolvency of any shareholder, or from any other cause, but without any wilful neglect or default on his own part, be prevented from recovering any proportion of the money, costs, or expenses so paid, he, his executors or administrators, shall be entitled again to divide the amount of what has not been recovered into as many equal parts as there shall then be shares in the capital of the company, (not including shares under forfeiture, nor the shares in respect of which such default shall have happened,) and every shareholder for the time being of the company, and the executors or administrators of every deceased shareholder, except as aforesaid, shall rateably, according to the number of shares holden by him, pay one or more of such last-mentioned parts, and in default thereof shall be liable to the same legal proceedings for the recovery thereof as are given by the statute in respect of the original proportions of such monies, costs, and expenses; and if any proportion of such monies, &c., shall still remain unpaid by reason of any such bankruptcy, insolvency, or other cause, such shareholder, his executors or administrators, shall have, in like manner from time to time and by way of accumulative remedy, the same powers, according to the circumstances of the case, of again dividing and enforcing payment of

the amount of such proportion until he or they shall in the end, if a *former* shareholder be fully reimbursed the whole of the said monies, costs, and expenses, and if *then* a shareholder the whole, excepting the portion belonging to the shares held by him.

Of the dissolution of the company.—Every company of more than six persons, carrying on the trade or business of bankers in England, is to be deemed (s. 48) a trading company within the provisions of the “act for facilitating the winding up the affairs of joint stock companies unable to meet their pecuniary engagements.”

CHAPTER XXI.

CONTRACTS CONCERNING MARRIAGE — CONTRACTS OF MARRIAGE — LIABILITIES RESULTING FROM ACTUAL AND REPUTED MARRIAGES.

SECTION I.—*Contracts concerning marriage.*—Marriage brokerage contracts—Contracts in restraint of marriage—Wagers on marriage—Bonds and unilateral covenants to marry—Contracts of betrothment—Conditional promises of marriage—Marriage settlements—Promises of portions and settlements—Contracts in fraud of settlements—Ante-nuptial settlements—Post-nuptial settlements.

SECTION II.—*The marriage contract.*—Nature and requisites of the marriage contract—Marriage by banns—Marriage by ordinary license—Marriage by special license—Of the consent of parents and guardians—Marriage by certificate and license from the registrar—Celebration of the marriage ceremony—Of the age of consent—Void marriages—Prohibited degrees of consanguinity and affinity—Non-compliance with the requisites of the marriage acts—Fraudulent celebration of marriage.

SECTION III.—*Liabilities resulting from actual and reputed marriages.*—Liability of the husband upon the wife's contracts made before and during marriage—Liability of the husband in respect of the wife's debts and engagements after separation—Separation by reason of adultery—Desertion of the husband by the wife—Desertion of the wife by the husband—Separation by mutual consent—Divorce *a mensâ et thoro*—Effect of a decree for alimony—Suspension of the coverture by temporary exile—Dissolution of the coverture by the natural or civil death of the husband—Liability of the surviving wife—Liabilities resulting from cohabitation—Contracts of kept mistresses.

SECTION I.

CONTRACTS CONCERNING MARRIAGE.

Marriage brokerage contracts.—Marriage brokerage contracts are contracts for the payment of money, or the conveyance of property, or the

performance of some act or duty, on the condition of the procurement of a particular marriage. Contracts of this description are now held to be void both at law and in equity; it being considered contrary to public policy to permit marriage to be made the subject of mercenary speculation, or to encourage the interference of hirelings in a matter which ought peculiarly to be left to the unbiassed feelings and impulses of the parties immediately concerned, and the disinterested counsel and advice of their relations and friends. If, therefore, a man binds himself by deed or covenants to pay a sum of money to another, on condition that the obligee or covenantee will bring about a particular marriage, the instrument is void; (a) whether the condition, or cause, or consideration for the bond or covenant does or does not appear upon the face of it. (b) Therefore, where a bond was given to a lady's maid for the payment to her of 1,000*l.*, and it appeared that the instrument had been given to her as a bribe to induce her to bring about a match between the obligor and her mistress, which she had succeeded in doing, the Court of Chancery set aside the security, and ordered it to be delivered up to be cancelled as a premium for improvident matches, and contrary to the public policy of the law. "The court has been extremely jealous of any contract of this kind made with a guardian or servant, especially with a servant, in respect of the marriage of persons over whom they have an influence; (and justly so, nothing tending more to improper matches;) and by rules established, not regarding whether the match is proper or no, if brought about by a marriage brokerage contract, sets such contract aside, not for the sake of the particular person, but of the public, and that marriages may be on a proper foundation; therefore, though a proper match, yet, for the sake of mischief that would be introduced, and to prevent that influence which servants more especially would gain over young ladies, the court sets it aside." (c)

A bond given by the husband to the wife's father to induce the latter to give his consent to the marriage has been held to be in the nature of a marriage brokerage contract, and contrary to public policy, as tending to induce parents to exercise their parental influence from base and corrupt motives, and encourage the buying and selling of women. Thus, where a young lady who had a marriage portion of 1,200*l.*, which had

(a) *Hall v. Potter*, 3 Lev. 411; Show. P. C. 76; 4 Br. P. C. 145, n.; 3 P. Wms. 76.

(b) "The vice of such a consideration is now pleadable at law." *Collins v. Blantern*, 2 Wils. 347; ante, 145. *Arundel v. Trevillian*, 1 Ch. Rep. 47. *Drury v. Hooke*, 1 Vern. 411. *De*

benham v. Oz, 1 Ves., senr., 276. *Smith v. Aykwell*, 3 Atk. 566.

(c) Per Lord Chancellor Hardwicke, *Cole v. Gibson*, 1 Ves., senr., 503. *Booth v. Earl of Warrington*, 4 Br. P. C. 163.

been given to her by her aunt, was sought in marriage by the plaintiff, and the latter was obliged, in order to obtain the consent of the defendant, the girl's father, to the match, to give him a bond for the payment of 200*l.*, in case the daughter, after her marriage with the plaintiff, should die without issue, or the issue should die before eighteen or marriage, and the nuptials were then celebrated, and the wife died without issue, and the plaintiff brought his bill to be relieved against the bond as having been unduly obtained, the defendant, the father, not having himself given the daughter any portion on her marriage; and there being, therefore, no valid reason for his requiring or exacting such a bond on the marriage, the court ordered it up to be cancelled, and required the defendant to refund what had been paid him by way of interest thereon, saying that the bond was in the nature of a marriage brokerage bond, and contrary therefore to public policy. (*d*) And there is no difference between a bond to pay money, and a bond to forgive a debt due, or a covenant or agreement to release an obligation, duty, or liability, as an inducement for the consent of parents and guardians. Therefore, where the Duke of Hamilton, prior to his marriage with the daughter and heiress of the Lord Gerrard, bound himself in a penalty of £10,000 to give to Lady Gerrard, the mother and guardian of his intended wife, within two days after the marriage, a general release from all accounts and all liability in respect of the rents and profits of certain estates, the property of the daughter, which had been received and expended by the mother (as it was alleged) in the maintenance and education of such daughter; and the duke, after the marriage had been celebrated, refused to give this release, and was sued at law for the penalty of 10,000*l.*, the Court of Chancery set aside the covenant on the ground that it seemed to have been extorted from him by a parent who had made an improper use of her parental power; that it was as if the mother had said, you shall not have my daughter unless you will release all accounts; that the agreement was within the mischief of a marriage brokerage contract, which had been so often condemned in equity; and that to tolerate it would be paving a way for guardians to sell infants under their wardship; and the greater the fortune was, the greater would be the temptation to treat with the guardian in such a manner in order to a marriage. "The duke might reasonably apprehend that he must have lost the young lady if he had refused the covenant." (*e*)

(*d*) *Keat v. Allen*, 2 Vern. 588; Pre. Ch. 267, *Mokun*, 1 P. Wms. 120; 2 Vern. 652; 1 Salk. 158, s. c.

(*e*) Lord Chancellor Cowper, *Hamilton v.*

A lease granted in consideration of the procurement of a particular marriage will be set aside by the Court of Chancery, and the estate discharged just as if no such lease had ever been made. (*f*)

CONTRACTS *in* RESTRAINT *of* MARRIAGE.—All contracts made in restraint of marriage are void, as being contrary to the public policy of the law. (*g*) Therefore, where a man sealed and delivered a written promise to the following effect, "I do hereby promise Mrs. Catherine Lowe, that I will not marry with any person besides herself; if I do, I agree to pay to the said Catherine Lowe £1000, within three months next after I shall marry anybody else," and an action was brought against him for a breach of his covenant, it was held that the deed was void. "This covenant," it was observed, "is in restraint of marriage. It is not a covenant to marry the plaintiff, but not to marry any one else; so that it restrained him from marrying AT ALL, in case she had chosen not to permit him to marry *her*. There is a great difference between promising to marry a particular person and promising not to marry any one else. If this had been a covenant to marry the plaintiff, the motion in arrest of judgment would not have been a proper motion. But it is not a covenant to marry her; the words import no such thing, 'tis a restraint upon matrimony, and is illegal." (*h*)

Wagers on marriages are illegal, as being contrary to public policy, as tending either to encourage the interference of interested parties, or to operate in restraint of matrimony. Therefore, where the defendant bet the plaintiff fifty guineas that the plaintiff would be married within six years, and the plaintiff bet the defendant fifty guineas that he would not be married within that period; and the time being expired, and the plaintiff not being married, he brought his action for the recovery of the amount of the bet; (*i*) it was held, that as the contract tended to prevent the plaintiff from marrying during the six years, it was a contract in restraint of marriage, and was therefore illegal and void. "The immediate tendency of the contract," observes Lord Ellenborough, "as far as it goes, is to discourage marriage; and we have no scales to weigh the degree of effect it would have on the human mind. It is said that the restraint is not to operate for an indefinite period, but only for six years, and that there might be reasonable grounds to restrain the party for that period. But no circumstances are stated to us to show that the restraint was reason-

(*f*) *Strublehill v. Brett*, 2 Vern. 446; 4 Br. P.C. 145, s. c.

(*g*) *Baker v. White*, 2 Vern. 215. *Hartley v. Rice*, 10 East, 24.

(*h*) *Lowe v. Peers*, 4 Burr. 2230 to 2234.

(*i*) No action can now be maintained upon a wager of any description, 8 & 9 Vict. c. 109, s. 18.

able, and the distinct and immediate tendency of the restraint stamps it as an illegal ingredient in the contract. . . . It is impossible," further observes Le Blanc, J., "to say that such a contract might not have an effect on the mind of the party to deter him from marrying during the six years; a contract to restrain marriage generally has been determined to be illegal, as being against the sound policy of the law; and nothing is stated here to show it to be otherwise in the particular instance." (k)

Bonds and unilateral covenants to marry.—If a man of full age binds himself by deed to marry a woman by a day named, or covenants with a woman to marry her by a particular period, he is responsible for the non-performance of his bond or covenants, although the woman may not be bound by a reciprocal bond or covenant to marry him. (l) No consideration is necessary, as previously mentioned, (ante, 1—4,) to support such a covenant; therefore, if the covenantee is ready and willing to receive the covenantor as a husband at the time appointed, and the latter neglects to fulfil his contract, he is liable to an action at the suit of the covenantee, for the recovery of such damages as she may have sustained by the breach of his engagement. In an action upon such a covenant, the woman need not allege that she offered herself to be married, but it is sufficient for her to aver that she was always during all that time ready and willing to be married; for it is the duty of the man to go and offer himself to the woman, and not for the woman to go in search of the man. "If she avers that she was '*semper parata*,' it is well enough, for the man is '*ducere uxorem*,'" (m) and "the modesty of the sex is considered by the common law." (n) "It can hardly be expected that a lady should say to a gentleman, 'I am ready to marry you, pray marry me.'" (o)

A woman is also as much bound by such a bond or covenant as a man, provided it has been obtained openly and fairly, and with perfect good faith. But as women are in general but little versed in matters of business, and are peculiarly liable to be deceived and imposed upon in matters in which their feelings are concerned, such a contract or engagement obtained from a woman would be regarded by the court with the greatest jealousy and suspicion, particularly where the man had entered into no corresponding engagement on his part. It is probable, indeed, that a court of equity would consider the procurement of a bond or covenant of

(k) *Hartley v. Rice*, 10 East, 23, 24.

(l) *Atkins v. Farr*, 1 Atk. 287. *Box v. Day*, 1 Wils. 61. *Cock v. Richards*, 10 Ves. 429.

(m) *Holcroft v. Dickenson*, 1 Freem. 346; ante, 202.

(n) Per Lord Coke and Lord Chancellor Hardwicke.

(o) Per Cur. *Seymour v. Gartside*, 2 D. & B. 57. Coleridge, J., 15 Law J., n. s. (Q. B.) 144.

this nature from a woman by a man who had given to the latter no corresponding obligation or covenant to marry her, as a fraud upon the woman, and would restrain him from proceeding against her by an action upon the covenant. (*p*) And if such a bond is obtained by means of any misrepresentation or concealment of the circumstances and situation of life of the party to whom it is given, the Court of Chancery will in all cases order it to be set aside. (*q*)

A bond given by the defendant, a single lady, recited that a marriage had been agreed upon between her and the plaintiff, but had been deferred at her request until after the death of her father; and that she and the plaintiff "had mutually engaged not to intermarry but with each other," and thereupon, in consideration thereof, and as a provision for the plaintiff in case she should refuse to marry him on her father's death, or should intermarry with anybody else, she bound herself to give him out of her fortune and estate £1200, and interest at £5 per cent., and the lady broke her engagement by marrying a third party, the Court of King's Bench held, that she and her husband were responsible for the payment of the money. (*r*) If a bond of this description were given with the knowledge and approbation of the lady's father, and as an inducement to a suitor to keep himself otherwise disengaged, it might still be considered valid and binding, both at law (*s*) and in equity; but if it has been clandestinely obtained from a single lady having expectations from her parent, without the knowledge of such parent, the Court of Chancery, if appealed to, will set it aside, and prevent any proceedings being taken upon it at common law. Thus where the plaintiff, being a man of twenty-six years of age, courted the daughter of a gentleman of substance, and was approved of by the young lady, but was refused by the father, who ordered him to discontinue his visits; notwithstanding which, the plaintiff contrived secretly to see the daughter, and at a clandestine interview obtained from her a bond, by which she bound herself in a penalty of £500 to marry him within thirteen months after the death of her father, and not to marry any other person; and if she should happen to die before the time appointed, to leave him £10 for a suit of mourning, and as a token of love; and the plaintiff then made and delivered to the lady a similar bond, by which he bound himself in a like penalty to marry her at the time appointed, and to settle certain property upon her; and the father then died, and the thirteen months expired, and the lady filed a bill in Chan-

(*p*) *Cock v. Richards*, 10 Ves. 437.

(*q*) *Key v. Bradshaw*, 2 Vern. 102.

(*r*) *Box v. Day*, 1 Wils. 59.

(*s*) *Burrell v. Strong*, 1 Freem. 66.

cery to be relieved from the penalty of her bond, the court ordered it to be delivered up to be cancelled. "Bonds of this sort," observed Lord Chancellor Hardwicke, given when the parents are living, are liable to great fraud and abuse; and to decree in favour of such a bond would be a great encouragement to persons to lie upon the catch to procure unequal marriages, against the consent of parents; they dare not solemnize the marriage in the lifetime of the parent, but only engage the affection, and draw the unfortunate person into a bond to forfeit their whole fortune; it is of very dangerous consequence, and tends to bring great misfortunes on families. It tends to encourage disobedience to parents, and indeed is a fraud and imposition on the parent, though there is no actual fraud between the parties. In this case the daughter lived with her father, and was dependent on him for her portion, and he considered her as a child to be advanced; and although a parent has no power by law to prevent the marriage of a child of full age, yet it is expected that she should take his consent and approbation. It is therefore a fraud on the father, who thinks his child has submitted to his opinion of the match, and so makes a provision for her, to advance her in marriage which, had he known of the bond, he would have not done, or might have done in such a manner as would have prevented the marriage." (t)

Bonds of this description given under such circumstances, ought indeed, it is submitted, to be held utterly void at law as well as in equity, as contrary to public policy. They appear, in the first place, to be in restraint of marriage, inasmuch as the union of the parties is postponed for an uncertain indefinite period, which may last the whole of their lives, or at all events long enough to prevent the marriage from being followed by the procreation of children; (u) and secondly, it tends to make children disregard their first duties to their parents, teaches them to desire and hope for the DEATH of the latter, rather than for their "length of days," encourages the purchase and sale of women, and degrades marriage, which ought to be founded on personal attachment, and the purest and most disinterested motives, to a mere mercenary speculation.

CONTRACTS of BETROTHMENT.

A betrothment is a mutual contract between a man and a woman for a future marriage between them. (v) Every marriage is preceded

(t) *Woodhouse v. Shepley*, 2 Atk. 539. *Cock v. Richards*, 10 Ves. 437. *Drury v. Hooke*, 1 Vern. 411.

(u) See *Hartley v. Rice*, 10 East 22, ante, 571.

(v) *Sponsalia sunt mentio et repromissio futurarum nuptiarum*. Dig. lib. 23. tit. 1, l. 1.

by an express or implied contract of this description, as a wedding cannot be agreed upon and celebrated at one and the same instant. Betrothments have consequently universally prevailed at all times and in all ages. (x) In Egypt, "the parents may betroth their daughter to whom they please, without her consent, if she has not arrived at the age of puberty, but after she has attained that age, she may choose a husband for herself, and appoint any man to arrange and effect her marriage." (y) A betrothment in foreign countries is frequently fortified by oaths and vows pronounced in the presence of the ministers of religion. Amongst the Moslems it is customary to read aloud an appropriate chapter of the Koran at the time of the making of the contract; and amongst Romanists the exchange of the mutual promises of marriage is frequently accompanied by forms and solemnities similar to those which surround the marriage contract itself. The mutual promises are made in the face of the church; the blessing is pronounced by the priest, and costly presents are exchanged. To render a betrothment valid the parties must not be within the prohibited degrees of consanguinity, or lie under any of those impediments which in the ecclesiastical and civil law render a marriage void *ab initio*. If either of them are married at the time of the betrothment the contract is void; but the married party will not in our own law be permitted to take advantage of his own wrong, and set up the previous marriage or a previous engagement, as an answer to an action for damages for his breach of contract. "Such a disability as consanguinity within the Levitical degrees might be pleaded, or it might be given in evidence upon non-assumpsit pleaded. Pre-contract is a disability, but it will not avoid the performance of your promise, because it proceeds from your own act." (z) If any married man, moreover, represents himself to be single and induces a woman to betroth herself to him upon the faith of his representation, a special action on the case for the deceit lies against him at the common law.

Contracts to marry at a future time were at one period of our legal history looked upon with great suspicion and dislike, and the courts seem to have been disposed to consider them void as contrary to the public policy of the law. "All such contracts," observes Lord Mansfield, "ought to be looked upon, as Lord Hardwick said in the case of *Woodhouse v. Shepley*, with a jealous eye. They are liable to many mischiefs and many dangerous consequences. When persons of different sexes,

(x) *Genesis*, ch. 29 v. 18, 19. Ciero 1, de divinat. Moris fuit veteribus stipulari et spondere sibi uxores futuras. Dig. lib. 23, tit. 2,

l. 2.

(y) Lane's *Modern Egyptians*, (Marriage.)

(z) *Harrison v. Cage*, Raym. 387.

attached to each other, and thus contracting to marry each other, do not marry immediately, there is always some reason or other against it: as disapprobation of friends and relations, inequality of circumstances, or the like. Both sides ought to continue free, otherwise such contracts may be greatly abused; as by putting women's virtue in danger by too much confidence in men; or by young men living with women without being married." (a) As the marriage cannot, however, be celebrated the very instant it is agreed upon, it would be a hard case if one of the parties, relying upon the plighted faith of the other, was to incur expense in anticipation of the fulfilment of the engagement, and not be entitled to recover damages for the injury he had sustained by the breach of it; and it has long been held that such contracts fairly entered into without fraud and deception on either side, are as valid and effectual in law as any other contracts; (b) and that actions are maintainable upon them not only for the recovery of any pecuniary damage that the parties may have sustained, but for an ample compensation for the misery and injury to their prospects and situation in life resulting from the breach of them.

Every contract of betrothment is founded upon a mutuality of obligation and liability, and when mutual covenants are entered into between a man and a woman to marry each other by a day named, the covenant of the one party is the foundation for the covenant of the other, and therefore, if the deed is founded on the common liability of both, it must be executed by both before any one of them can be made liable upon it. (c) Covenants of this description constitute mutual conditions to be performed at the same time, so that if one party was ready and offered to perform the contract, and the other neglected or refused, the party that was ready and offered has fulfilled his or her engagement, and may maintain an action for the default of the other. (d)

A covenant to marry generally without specification of time, is a covenant to marry within a reasonable period after request, and if the covenantor is required by the covenantee to fulfil the covenant, and neglects so to do within a reasonable period, he is liable to an action at the suit of the latter for the recovery of such damages as may have been sustained by the breach of contract.

Mutual promises of marriage.—A betrothment by simple contract is founded upon mutual promises to marry at a future period, and is perfected

(a) *Lowe v. Peers*, 4 Burr. 2230. *Key v. Bradshaw*, 2 Vern. 102.

(b) *Peck v. Ingram*, Styles, 263, 273. *Baker v. Smith*, ib. 295, 303, 304. *Burrell v. Strong*,

1 Freem. 66. *Holder v. Dickeson*, ib. 94; 3 Keb. 148, s. c. *Cork v. Baker*, 1 Str. 32.

(c) Ante, 185, 244.

(d) Ante, 202.

and made binding by the bare consent of the parties, (e) the promise of the one party to marry being the consideration for the promise of the other. The contract must be obligatory on both parties at the same instant, so that each may have an action upon it, or it will bind neither. "If the woman's promise does not bind, the man's promise is but *nudum pactum*, and therefore it is actionable either on both sides or on neither side. (f) "It is essential," observes Pothier, "to the validity of a contract of betrothment that the engagement should be reciprocal. Therefore, where the advocate-general in the cause of the Lord Desportes, produced a note signed by the said lord, and conceived in these terms: 'I promise to Mademoiselle Bourderet to marry her;' it was held that the note was void, and did not create any obligation, because there was no reciprocal promise on the part of the said lady, who had only *ex post facto* placed her signature to the note in the absence of the said Lord Desportes." The mutual promises must, undoubtedly, as the one is the foundation of the other, strictly and technically speaking, be made at the same time. But in our own law, an offer or promise of marriage, sent by post, or left at a lady's residence for her consideration, is deemed to be continually renewed until she has had an opportunity of accepting or rejecting it; (ante, 87;) and the moment it is accepted the mutual promises are in contemplation of law *then* exchanged between the parties, and the liability at once attaches.

And if a man makes an express offer, or promise of marriage, to a woman, the acceptance thereof by the latter, and the promise made by her in return, may, so far as it is necessary to be proved, in order to enable her to sustain an action against the man for a breach of his engagement, be established through the medium of her conduct and actions at the time, as well as by express words. If there be an express promise by the man, and it appears that the woman countenanced it, and by her actions at that time behaved herself so as if she agreed to the matter, though there be no actual promise, yet that shall be sufficient evidence of a promise on her side." (g) Therefore, where a gentleman asked for and obtained the consent of the parents to his marriage with their daughter, and the young lady stood in the room within the hearing of the parties, and made no objection to the match, it was held that her silence under such circumstances, afforded as cogent evidence of her assent as an express

(e) Sufficit nudus consensus ad constituenda sponsalia. Dig. lib. 23, tit. 1, l. 4.

(f) Holt, C. J., *Harrison v. Cage*, 1 Salk. 24; Carth. 467; 5 Mod. 411. n. c. *Holder v.*

Dickinson, 1 Freem. 95. *Dickinson v. Holcroft*, 3 Keb. 148. Ante, 33, 34, 35.

(g) Holt, C. J., *Hutton v. Mansell*, 6 Mod. 172; 3 Salk. 16.

affirmative. (*h*) But if the woman is the defendant in the action, and is herself sued for a breach of promise of marriage, the promise must then be strictly proved, and nothing short of an express promise on her part will suffice to sustain the action.

Authentication of the contract.—We have already seen (*ante*, 95) that mutual promises of marriage do not come within the fourth section of the Statute of Frauds, which requires "agreements in consideration of marriage," to be put into writing and signed by the party to be charged therewith. That section has been held to extend only to agreements to pay marriage portions, and not to contracts to marry. (*i*) Oral engagements and promises to marry will consequently sustain an action, unless the marriage is limited to take place upwards of a year from the making of the contract. (*k*)

No **STAMP** is required upon any contract of this description, as previously mentioned, (*ante*, 180,) inasmuch as the value of it is not measureable by any pecuniary standard.

A man, who was paying particular attentions to a young girl, was asked by the father of the latter, after one of his visits, what his intentions were? and he replied, "I have pledged my honour to marry the girl in a month after Christmas," and it was held that this declaration to the father, who had a right to make the inquiry, and to receive a true and correct answer, taken in connexion with the visits to the house, and the conduct of the young people towards each other, was sufficient evidence of a promise of marriage. (*l*)

Time of performance.—The common law does not altogether discountenance long engagements to be married. If parties are young, and circumstances exist showing that the period during which they had agreed to remain single was not unreasonably long, the contract is binding upon them; but if they are advanced in years, and the marriage is appointed to take place at a remote and unreasonably long period of time, the contract would be voidable at the option of either of the parties as being in restraint of matrimony. (*m*) If no time is fixed and agreed upon for the performance of the contract, it is in contemplation of law a contract to marry within a reasonable period after request. (*n*) Either of the parties,

(*h*) *Daniel v. Bowles*, 2 C. & P. 553. Il n'est pas toujours nécessaire que ce consentement soit exprès. Lorsqu'un père fiancé sa fille à quelqu'un, la fille, qui est présente, et qui ne contredit à ce que fait son père, censée consentir tacitement aux fiançailles. Poth. Mariage, Part 2, ch. 1, No. 30. Quæ patris voluntati non repugnat, consentire intelligitur. Dig. lib. 23, tit. 1,

l. 12.

(*i*) *Cork v. Baker*, 1 Str. 33. Holt, C. J., *Harrison v. Cage*, 1 Raym. 388.

(*k*) *Ante*, 97.

(*l*) *Potter v. Deboos*, 1 Stark. 82.

(*m*) *Hartley v. Rice*, 10 East, 24.

(*n*) *Phillips v. Crutchley*, 3 C. & P. 178. *Harrison v. Cage*, Raym. 386.

therefore, after the making of such a contract, may call upon the other to fulfil the engagement, and in case of a refusal or a neglect so to do on the part of the latter, within a reasonable period after the request made, the party so calling upon the other for a fulfilment of the engagement, may treat the betrothment as at an end, and bring an action for damages for a breach of the engagement. (o) If both parties lie by for an unreasonable period, and neither renew the contract from time to time, by their conduct or actions, or call upon one another to carry it into execution, the engagement will be deemed to be abandoned by mutual consent, and the parties will be free to marry whom they please.

The Roman law very properly considered the term of two years amply sufficient for the duration of a betrothment; and if a man who had engaged to marry a girl did not think fit to celebrate the nuptials within two years from the date of the engagement, the girl was released from the contract. (p)

The moment that either of the parties puts it out of his or her power to fulfil the contract, by marrying somebody else, there is a breach of the engagement, and a right of action at once attaches, whatever may be the period limited for the fulfilment of the marriage ceremony. If the contract was a contract to marry on request, no request need be made nor alleged in the pleadings, as the defendant by his or her conduct has dispensed with the necessity of it, and rendered it useless. "I think," observes Lord Denman, in a recent case, "that if either party, by his own act, so alters the state of things, as to put it out of his power to fulfil the contract he has entered into, that party so far dispenses with the necessity of the other party going through the useless formality, or requesting him to do that which it is impossible he can do, as to entitle the other party at once to maintain an action for the breach of contract. It seems to me, that in such a contract the disability to fulfil it, imposed by either party on himself or herself, is a necessary dispensation with all conditions precedent to be performed by the other party." (q)

Conditional promises of marriage.—The validity of conditional promises of marriage will depend upon the reasonableness of the condition, and the time limited for its accomplishment. We have already seen that the law regards with jealousy and dislike all clandestine contracts for the celebra-

(o) *Gough v. Farr*, 2 C. & P. 681.

(p) Si is qui puellam suis nuptiis pactus est, intra biennium exequi nuptias supersederit, ejusque spatii fine decurso, in alterius postea conjunctionem puella pervenerit, nihil fraudis ei sit,

que nuptias maturando, vota sua diutius eludi non passa est. Cod. lib. 5, tit. 1, l. 2.

(q) *Short v. Stone*, 15 Law J. N. S. (Q. B.) 145. *Cuines v. Smith*, ib. (Exchr.) 106.

tion of marriage on the death of parents and relations from whom money is expected, and who are kept in ignorance of the contract, and that such contracts are generally considered void on public grounds by the Court of Chancery ; also, that if the celebration of the marriage is made to depend upon the happening of a distant and uncertain event, which may, in all probability, not take place during the lives of the parties, it would probably be considered to be a contract in restraint of marriage, and held void on that ground.(*r*) If the condition is a lawful condition, the liability, of course, attaches as soon as the condition has been accomplished. (*s*)

If, by the contract of betrothment, it is stipulated that the girl shall have a certain sum as a marriage portion, or that the man shall make a certain settlement, the liability upon the contract does not attach until the condition has been accomplished. And if a reverse of fortune prevents one of the parties from fulfilling the engagement in respect of the portion or the settlement, the other is discharged from liability. (*t*)

Avoidance of the contract by misrepresentation and deceit.—It is said by Pothier that if a man comes to discover the existence of circumstances connected with the person he has engaged to marry, which would have prevented him, had he known them at the time of the betrothment, from entering into the contract, he is discharged from his engagement. The party, however, cannot make himself a judge in his own case, and the discharge from liability depends rather upon the nature of the circumstances, the light in which they would be regarded by mankind at large, and the existence or non-existence of fraud.

The rule of the common law upon this subject is, that the concealment of any important fact which ought in good faith to be made known, discharges the party who has been the victim of the deception from all liability upon the contract. If parties hang out false colours ; if they are not in reality what they appear to be at the time of the engagement, the contract is void.

The circumstances that have been held to justify the rescision of the contract are pretty much the same in all countries. If one party has been convicted of a crime, and the other did not know of it at the time of the betrothment, the contract may be rescinded by the party who was kept in

(*r*) Ante, 569. *Hartley v. Rice*, 10 East, 22.

(*s*) *Cole v. Cottingham*, 8 C. & P. 75. *Atchinson v. Baker*, 2 Peake, 103.

(*t*) L'orsque par le contrat de fiancailles, on a réglé ce que chacun des parties apporterait en mariage ; je suis ne mètre engagé à vous épouser

que sous la condition que vous apporteries en mariage ce que vous avez promis d'y apporter. Le renversement de votre fortune vous mettant hors d'état de l'apporter, je suis dechargé de mon engagement, quasi ex defectu conditionis. — Poth. No. 60.

ignorance of the fact.(u) If a woman at the time of the betrothment was a woman of general bad character, and this was unknown at the time to the man who promised to marry her, the latter is entitled, as soon as he discovers what she really is, to break off the engagement. General reputation of bad character must be established in such a case.(x) If particular instances of misconduct are relied upon, they must be fully proved.(y) If the woman has previously committed fornication ; if she was with child at the time of the betrothment, or had previously had a child, unknown to the promisor, the latter is discharged from his promise.(z) If he discovers the fact before the marriage, and on that ground declines entering into the marriage, he has a right to do so, although the transaction may have taken place long previously, and the conduct of the woman may have since been perfectly correct,(a) for every unmarried woman is presumed to be a virgin, and a man who has agreed to have her upon such a presumption cannot reasonably be obliged to take her when she turns out to be different from what he expected. If a widow conceals the fact of her previous marriage, and betroths herself as a virgin, this is a fraud and deceit upon the man who has contracted with her ; she is herself not in a condition to fulfil the engagement on her part in accordance with what must be taken to have been the original intention of the contracting parties, and has no ground in law or in foro conscientie to call upon the man to fulfil his contract. But if the circumstances, whatever they may be, are known by the other contracting party, there is then no fraud or deceit in the matter, and he has no ground for refusing to complete his engagement.(b)

If by gross misconduct during the betrothment, a woman shows herself to be a different person from what she was presumed to be by the suitor at the time he engaged to marry her, he is of course released from his contract. If it can be shown that she has, without the knowledge of the man whom she has engaged to marry, consorted with prostitutes and loose women, has been found drinking with strangers in public houses, or receiving the addresses of other men, or conducting herself with immodesty or impropriety, and not as a virtuous woman ought to conduct herself, the man who has promised to marry her has a right to say that he has been deceived in her character, that she is not the person he took her to be at the time he made the contract, and that he will not fulfil his engagement.

So, on the other hand, if a man by a radical alteration in his conduct

(u) Pothier, No. 62.

(x) *Foulkes v. Sellway*, 3 Esp. 237.

(y) *Baddaley v. Mortlock*, Holt, N. P. C. 152.

(z) *Irving v. Greenwood*, 1 C. & P. 350.

Young v. Murphy, 3 Sc. 379 ; 3 Bing. n. s. 54.

(a) *Bench v. Merrick*, 1 Car. & Kirw. 467.

(b) *Abbott, C. J.*, 1 C. & P. 351. *Bench v. Merrick*, 1 Car. & Kirw. 467.

for the worse after the betrothment, shows that he is not the person he was fairly presumed to be by the woman at the time she accepted him as her betrothed, the latter is entitled to break off the engagement and refuse to receive him as her husband.

Where an action was brought against a lady and her newly-married husband for the breach of a promise of marriage previously made by her to the plaintiff, and it appeared that the latter, whilst paying his addresses to her, had behaved with rudeness and indifference, that when speaking of her to third persons, he had given great proof of want of feeling as well as of gross manners and sentiments; Lord Ellenborough told the jury, "that, notwithstanding the promise of marriage proved, if the plaintiff had conducted himself in a brutal or violent manner, and had threatened to use the defendant ill, a woman, under such circumstances, had a right to say she would not commit her happiness to such keeping; and she might set up such defence, and it would be legal: but though no such evidence appeared which went to the ground of action, if the plaintiff appeared to be a man of gross manners and destitute of feeling; as he complained by his action of an injury in the loss of the society of a woman which he appeared never to have valued, and the pleasures of which society he seemed little calculated to taste, the jury should take it into their consideration (in estimating the amount of damages) in the verdict they were to pronounce."^(c)

If there has been a fraudulent concealment of a girl's real situation and prospects in life, this is a deception which avoids the contract. If a lady, for example, has, previous to her betrothment, secretly disposed of, or squandered away property of which she was previously possessed, or has granted it to her relations and friends, and the contract of betrothment was entered into in the belief that her property and fortune continued the same as it had been previously generally believed and reputed to be, and no disclosure is made of her altered situation and position to the suitor at the time of the betrothment, this is a deception which entitles him to say, when he discovers the fraud, that he will not be bound by the engagement. So if a woman is deeply involved in debt at the time of her betrothment, and the fact is kept secret from her intended husband, this is a gross fraud which at once entitles him to avoid the contract. More especially if false representations are made by a girl, or by her friends in collusion with her, as to her circumstances and situation in life, and the amount of her fortune and marriage portion, and the contract was entered into by the man

(c) *Leeds v. Cook*, 4 Esp. 257.

on the faith of such representations, the fraud thus practised upon him is an answer to any action that may be brought against him upon the contract. (d) But if the plaintiff herself was no party to the fraud, and made no false representation, and was guilty of no wilful suppression of the truth, the defendant cannot escape from liability.

Dispensation of the contract.—What amounts to a sufficient excuse for its non-performance.—If, after the mutual promises of marriage have been exchanged, the woman makes any conveyance or disposition of any considerable portion of her property without her intended husband's knowledge and concurrence, this is a deception upon the latter, which entitles him to withdraw from the engagement as soon as he is made aware of the circumstance. "The injury he would sustain if such a transaction were to be sanctioned is obvious; for since the wife's apparent fortune in addition to his own may be a weighty consideration and inducement for entering into the marriage state, the happiness of both might be endangered, if, after the treaty began under such calculations and persuasions, the intended wife should be enabled, prior to the marriage, to disappoint them, by disposing of, or abridging her interest in, the property that belonged to her. (e) If, therefore, nothing has been said or agreed upon at the time of the betrothment respecting the settlement to be made on the marriage, and the lady insists on making a settlement of her own private fortune to her separate use, free from the dominion and control of the intended husband, the latter is entitled, if he disapproves of the arrangement, to withdraw from the contract, and to say that he will not marry her upon such terms.

Accidents and mishaps altering the condition of either of the parties.—"If," observes Pothier, (No. 60, 61,) "anything has happened to my betrothed which would have prevented me from entering into the contract could I have foreseen it at the time I promised to marry her, I am discharged from my engagement." This doctrine, as thus broadly stated, does not accord with the strict principle of the common law upon the subject. Many circumstances may have occurred, such as the loss of fortune, the death of powerful relations, the deprivation of personal beauty, &c., which, in the judgment of particular individuals, would have prevented them from entering into the contract had they occurred prior to the making of it, but which form no excuse in the eye of the common law for the non-fulfilment of the engagement. The discharge depends in our own law upon the nature of the circumstances that have occurred, and it is for the courts to determine

(d) *Wharton v. Lewis*, 1 C. & P. 529. *Foot v. Hayne*, ib. 546.

(e) 1 Rep. 163. *Taylor v. Pugh*, 1 Hare,

615. *Howard v. Hooker*, 2 Ch. R. 44. *Lance v. Norman*, ib. 42. *Poulson v. Wellington*, 2 P. Wms. 535.

whether it amounts to a dispensation of the contract or not. The general rule is, that if the situation and position of either of the parties as regards his or her fitness for the marriage bed, is materially and permanently altered for the worse, (whether by or without the fault of such party,) between the time of espousals, and the celebration of the nuptials, the contract is dispensed with, and the other party is released from the engagement. "We must look at a contract of this description," observes Lord Denman, "with a view to the feelings and intentions of the parties to such a contract, at the time it was made. The parties must be taken to have contracted with reference to the state and condition in which they were at the time of the making of the contract." (f) Therefore, as is observed by Pothier, if a girl, after her betrothment, is ravished, the rape operates as a dispensation of the contract, although the girl herself was not in any way to blame in the matter. (g)

If one of the parties is attacked by blindness, or by an incurable disease, or any malady calculated prematurely to impair and weaken the constitution, this is such an alteration in the condition of the party, affecting his or her fitness for the duties and obligations of matrimony, as will dispense with the performance of the contract on the part of the other party. (h) The loss of a nose by one of the parties during the betrothment, is considered by the French law as a sufficient excuse for the breaking off of the engagement by the other. (Pothier, No. 60.) But such a misfortune would not be considered to amount to a dispensation of the contract at the common law, inasmuch as the loss of that member is not in anywise calculated to diminish the capability of the party to fulfil the duties of matrimony; and the mere diminution of personal beauty, unaccompanied by loss of health, is no answer to an action for a breach of a promise of marriage.

If, after the accident or misfortune, or whatever it may be, has occurred, the parties continue to conduct themselves towards each other as persons betrothed, they will be deemed to have renewed the engagement, and will be responsible accordingly. (i)

Dissolution of the betrothment by consent.—Parties who have exchanged mutual promises of marriage, may of course at any time before the contract is carried into effect by the performance of the marriage ceremony, dissolve the engagement by mutual consent. "*Quæ consensu*

(f) 15 Law J. n. s. (Q. B.) 145.

(g) Lorsque ma fiancée a été depuis nos fiançailles, ravie par quelqu'un, quoiqu'elle n'ait pas consenti au rapt, ce rapt me délie de l'engage-

ment des fiançailles. *Traité du Mariage*, No. 60.

(h) *Atchinson v. Baker*, 2 Peake, 103.

(i) Pothier, *Tr. du Mar.* No. 63.

contrahuntur contrario consensu dissolvuntur." (k) In some countries it has been, and is, the custom to strengthen the contract by oath. This is at present frequently the case in France, but the oath does not there prevent the parties to the contract from dissolving it by mutual agreement.

MARRIAGE PORTIONS *and* MARRIAGE SETTLEMENTS.

Promises of portions and settlements.—A promise to give a girl a specified sum on her marriage, or to pay money to either the intended husband or wife, or settle property upon them, or either of them, in the event of their marrying, creates a binding obligation in the eye of the law, the performance of the marriage being a good consideration for such an undertaking. "Marriage is one of the strongest considerations in the law, either to raise a use, or to found a contract, gift, or grant." (l) But the promise must be authenticated by a note in writing, signed by the promisor or his agent, pursuant to the fourth section of the Statute of Frauds, which requires, as we have already seen, (ante, 95, 96,) all agreements made in consideration of marriage to be put into writing, and signed by the party to be charged therewith, or his agent thereunto lawfully authorized. (m) And the celebration of the marriage on the faith of the promise, is no part performance of the agreement, so as to take it out of the operation of the statute. (n) If, therefore, the husband, prior to the marriage, gives a verbal promise to the wife that he will settle her property upon her and her children, she has nothing more to rely upon but his honour; and if after the marriage he breaks his word, she has no remedy against him. "In cases of fraud, as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former, equity would relieve even against the words of the statute; but where there is only a reliance upon the honour, word, or promise of the defendant, the statute making those promises void, equity will not interfere." (o)

A father, on a treaty for the marriage of his daughter, signed an agreement with the intended husband, to give the daughter a certain sum as a marriage portion, and afterwards designing to escape from his agreement, got his daughter "to put on a good humour," and get possession of the

(k) *Baker v. Smith*, Styles, 295, 303, 304. *Stanton v. Paton*, 1 C. & K. 148; Poth. Tr. du Mar. No. 55.

(l) 1 Freem. 96; Raym. 387.

(m) *Randall v. Morgan*, 12 Ves. 73. *Bowdes v. Amherst*, Pra. Ch. 404.

(n) *Dundas v. Dutens*, 1 Ves. 199. *Montacute v. Maxwell*, 1 P. Wms. 618; 1 Str. 236, s. c.

(o) Lord Chancellor Parker, *Montacute v. Maxwell*, 1 P. Wms. 620. *Dundas v. Dutens*, 1 Ves. 199.

document, and deliver it back to him, and then get married, which she did, the father standing at the corner of the street to see her go to church; and the Court of Chancery ordered the agreement to be carried into effect. (*p*)

A mother who was the absolute owner of certain property, was present at a treaty for her son's marriage, and heard him declare to his proposed wife and her relations and guardians, that she (the mother) was only tenant for life of the property, and that the remainder was limited to him after her death; and the mother was privy to the execution of a deed, whereby the son proposed to settle the property on her death upon the issue of the marriage; and it afterwards appeared that the mother was not tenant for life, but the absolute owner of such property, and that there was no limitation of it to the son after her decease, at the time of the execution of the settlement; and the Court of Chancery ordered her to make good the settlement, and execute a conveyance of the property, and clothe the son with the interest which she permitted him to represent that he had at the time of the conclusion of the marriage. (*q*)

If, therefore, the relations and friends of parties proposing to be married pretend to settle estates upon them, or to make a provision for them, and the children of the marriage, and the nuptials are celebrated upon the faith of such settlements or provision, and under the belief that they have been duly made; and the transaction afterwards turns out to be a cheat, the Court of Chancery will compel the parties who have been guilty of the fraud to make good that which they pretended to do. (*r*) But a representation concerning the fortune or circumstances, or prospects of a party about to be married, by a relation who does not at the time know that his statement is untrue, and who does not make it fraudulently, and with intent to deceive, will not bind him in equity to make it good. The transaction must amount to a fraud to warrant the interference of the court, or there must be some writing signed by the party, amounting to a promise, to make good the representation. (*s*)

What is a sufficient note or memorandum of a promise to make a settlement.—If a husband writes a letter, promising to make a settlement upon his intended wife, or a father, by letter, promises "to give such a fortune with his daughter to one who should marry her," this is a sufficient compliance with the requirements of the statute. But the promise must be an

(*p*) *Mallet v. Halfpenny*, 1 Eq. Abr.; 20 pl. 6; Pre. Ch. 404.

(*q*) *Hunsden v. Cheyney*, 2 Vern. 150.

(*r*) *Beverley v. Beverley*, 2 Vern. 133. *Douglas v. Ward*, Ch. Ca. 99.

(*s*) *Merewether v. Shaw*, 2 Cox, 124.

-absolute promise, and not of course dependent upon conditions and contingencies remaining unaccomplished. (t)

Contracts in fraud of settlements and promises of marriage portions.—Any private underhand agreement or treaty entered into for the purpose of infringing or defeating an open public agreement, made in consideration of marriage, is fraudulent and void, and will be set aside by the Court of Chancery. A bond, for example, given by the husband to return part of his wife's marriage portion, without the privity of his own parents and guardians, and all the parties to the treaty of marriage, is fraudulent and void, and cannot be enforced against the husband. (u) If the father, or any other relation or friend of the husband or wife, who has promised or agreed to make a settlement of property upon one or both of them on their marriage, or to give a marriage portion to the wife, takes a bond or covenant from either the husband or wife, or both of them, to repay the whole or any part of such marriage portion or reconvey an estate granted or intended to be granted, the contract is void, as being a fraud upon the parties to the treaty of marriage, and upon the parents and guardians, who have a right to give or withhold their consent, and as tending to encourage fraud and deceit, and being generally contrary to public policy. Thus where a father agreed to give his son a certain annuity for his maintenance on his marriage, and the son agreed with the father to release a certain portion of the allowance, and this latter agreement was kept from the knowledge of the intended wife and her father until the nuptials were celebrated; (x) it was held that the last agreement was fraudulent and void, and the Court of Chancery agreed that it should be set aside. (y) So where, on the treaty of marriage between Lord Arbuthnot and Miss Morrison, the father of the latter agreed to give 50,000 marks as a marriage portion with his daughter; and a settlement was agreed to be made by Lord Arbuthnot and his friends, in consideration of that fortune; and the night before the execution of the articles, Morrison prevailed on Lord Arbuthnot to sign and execute a writing, to the effect that the real agreement was for 40,000 marks only, and that Morrison had agreed to the contract for 50,000, upon the express understanding that Lord Arbuthnot should, by his private obligation, bind himself to release the 10,000, it

(t) *Bird v. Blosse*, 2 Ventr. 361. *Moore v. Hart*, 1 Vern. 110. *Seagood v. Meale*, Fre. Ch. 561. *Randall v. Morgan*, 12 Ves. 67. *Ayliffe v. Tracy*, 9 Mod. 4.

(u) *Kemp v. Coleman*, 1 Salk. 156. *Turton v. Benson*, 2 Vern. 764; 1 P. Wms. 495, s. c. *Pitcairn v. Ogbourne*, 2 Ves. sen. 380; 1 Ves. sen. 277. *Jackson v. Duchaire*, 8 T. R. 552.

(x) *Peyton v. Bladwell*, 1 Vern. 240. *Scott v. Scott*, 1 Cox, 367. *Palmer v. Neave*, 11 Ves. 166. *Troughton v. Troughton*, 3 Atk. 656; 1 Ves. 86, s. c. *Gregor v. Kemp*, 2 Swanst. 404, n.

(y) *Buller v. Chancey*, cited in *Gifford v. Gifford*, 1 Eq. Abr. 88, E. 3.

was held that this clandestine contract was absolutely void, as being-*contra fidem tabularum nuptiarum*, and that Morrison was bound to pay the marriage portion, as publicly agreed upon in the presence of the friends of Lord Arbutnot, without any diminution or abatement. (z)

If the relations of a woman furnish her with money, in order that she may appear to have a considerable marriage portion, and secretly take from her a bond or covenant to repay the money advanced after her marriage, the bond is void, both against the husband and wife. Thus, where a brother secretly advanced his sister 160*l.* to make up the marriage portion required by her proposed husband, taking a bond from her for the repayment of the money advanced, and the marriage was celebrated, and the husband, who knew nothing of the bond, died without issue, and afterwards the wife died, and an action was then brought upon the bond against her executor to recover back the 160*l.*; the Lord Chancellor ordered the bond to be delivered up to be cancelled, observing that "that which was once a fraud will always be so, and the accident of the woman's surviving the husband will not better the case." (a)

So if a relation or friend of the husband advances him money, or clothes him with the apparent possession of property to enable him to make a show of wealth in order to obtain a corresponding portion with his wife, and takes from such husband a bond or covenant for the repayment of the money advanced, or the surrender of the property intrusted to him, the bond or covenant will be void, and the husband will be entitled to hold the property for his own use, notwithstanding that he was himself a party to the deception. "In cases of frauds on marriage, although the husband is a party to the fraud, yet his interest is not to be affected, since it is impossible to make him liable in respect thereof without involving the wife and children and family upon whom the deceit has been practised." (b)

A widow, on the marriage of her son, agreed with the wife's relations to make a settlement on him and his wife and the children of the marriage of certain lands which she had in jointure. She at the same time obtained an agreement from him to assign a leasehold estate to her, and also to pay her an annuity, but this agreement was kept secret from the intended wife and the other parties to the treaty of marriage, and it was accordingly set aside as being underhand and fraudulent. (c)

(z) *Morrison v. Arbutnot*, 8 Br. P. C. 247; 1 Br. Ch. C. 548, n.

(a) *Gale Lindo*, 1 Vern. 475.

(b) Lord Chancellor Thurlow, *Thompson v.*

Harrison, 1 Cox, 346. *Webber v. Farmer*, 4 Br. P. C. 170.

(c) *Lamles v. Hanman*, 2 Vern. 466, 499.

If a man about to be married is largely indebted, and a relation comes forward and pays off his debts in order to enable him to gain the consent of the parents of the lady to the match, and at the same time takes a bond from the lady and her intended husband to pay him a certain sum within a specified period from the celebration of the nuptials, the bond is a fraud upon the parents, whose consent would not have been obtained had they known of its existence, and the husband and wife are consequently entitled, after the marriage, to set it aside, although they were both parties to the fraud. (d)

"Joseph Montefiori, a Jew, being engaged in a treaty of marriage, his brother Moses, to assist him in his designs, and represent him as a man of fortune, gave him a note for a large sum of money as the balance of accounts between them, which balance he (Moses) acknowledged to have in his hands, though in truth no such balance nor anything like it existed. After the marriage had been celebrated, Moses reclaimed the note as having been given without consideration, and the matter was referred to arbitration. The arbitrators awarded that the note should be delivered up, which Joseph refused to do, and the matter having been brought before the Court of Queen's Bench, that court determined that the award was wrong, and set it aside, declaring that Joseph was entitled to the note, that Moses was bound by his acknowledgment and promise, and should not be permitted to set up his own fraud in his defence, although his brother was in collusion with him. "The law," observes Lord Mansfield, "is, that where, upon proposals of marriage, third persons represent anything material in a light different from the truth, even though it be by collusion with the husband, they shall be bound to make good the thing in the manner in which they represented it. It *shall* be as represented to be; for no man shall set up his own iniquity as a defence." (e)

Upon the same principle, creditors who conceal wholly or in part debts due to them from a man about to be married, and represent that he is not indebted, or is only indebted to them to a certain amount in order to serve the turn of their debtor and get the parents of the woman to consent to the marriage, will be bound by such fraudulent representations, and will be barred from all remedy for obtaining payment thereof, just as effectually as if they had executed a release under seal. (f) The principle on which all these cases have been decided is that good faith in matters relating to the contract of marriage, is so essential to the happiness both of parents and children,

(d) *Redman v. Redman*, 1 Vern. 347.

(e) Lord Mansfield, C. J., *Montefiori v. Montefiori*, 1 W. Bl. 363.

(f) *Neville v. Wilkinson*, 1 Br. Ch. C. 543.

Eastbrooke v. Scott, 3 Ves. 460; 16 Ves. 125.

that whoever treats fraudulently on such an occasion shall not only not gain, but lose by it. (g)

Ante-nuptial settlements.—As soon as a woman is married, her power of disposition over her own property and fortune, independently of the husband, is gone; she cannot sell, grant, or convey it away without his consent, and all her arrangements respecting it are subject to his superior control and direction. If, therefore, a woman, intending to be married, wishes to preserve her own fortune, or any portion of it, free from the dominion of the husband, she must make a settlement of it prior to the marriage. (h) The law permits a woman, before her marriage, to convey her property to trustees to be holden by them for her separate use after marriage. If she is in trade, she may convey all her stock in trade and furniture to trustees to enable her to carry on the business separately from the husband, and if the latter do not intermeddle with the business, the stock in trade and furniture will not be liable to be seized for the debts of the husband. (i)

If a woman is engaged to be married at the time she proceeds to make a settlement of her property upon herself, she must give notice of her intention to make the settlement to her intended husband, to give him an opportunity of withdrawing from the engagement in case he disapproves of her arrangements. If she neglects so to do, the settlement will in general be considered to have been made in fraud of his marital rights, and will not be binding upon him after the celebration of the nuptials. The Court of Chancery will in general set aside such a settlement, and give the husband the same control over the property as if it had never been executed. (k) In the exercise of this stringent and arbitrary power, the court does not, it has been said, regard the scope or object of the settlement, its providence or improvidence, but looks only at what is called the deception practised on the husband. Thus, a settlement made by a widow of certain property, upon the children of a former marriage, during the pendency of a treaty for a second marriage, has been considered fraudulent and void as against the second husband, if he was not informed of the circumstance prior to the cele-

(g) The Lord Chancellor, 1 Br. Ch. C. 547.

(h) So by the French law, En Traité du Mariage, et avant la foi baillée, et benediction nuptiale, homme et femme peuvent faire, et apposer telles conditions douaires donations et autres conventions que bon leur semblera. Il n'est plus permis apres la celebration du mariage de faire aucunes conventions matrimoniales. Poth. No. 48.

(i) *Jarman v. Woodlton*, 3 T. R. 618. *Haslington v. Gill*, 3 Doug. 415; 3 T. R. 620, n. *Dean v. Brown*, 8 D. & R. 95; 5 B. & C. 336.

(k) *England v. Downs*, 2 Beav. 522. *Carlton v. Earl of Dorset*, 2 Vern. 17. *Goddard v. Snow*, 1 Russ. 485. *Howard v. Hooker*, 2 Ch. R. 42.

bration of the nuptials. (l) But the opinion and dicta upon this point cannot, it is apprehended, be supported to this extent. If there has been no practised or intentional concealment; if the widow has done nothing more than make a fair and reasonable provision for her children, such as every mother in her situation would morally be bound to make, it is impossible to say that there is any fraud in the case, or that the husband can *in foro conscientie* be entitled to upset the settlement. She may have derived the property from her late husband; it may have been bequeathed to her by him in the full confidence that she would employ it for the support and maintenance of his and her children, and if that be so, she acts only in the execution of the most sacred of all trusts when she attempts to secure it to their use free from the dominion of the intended second husband. "It is not every alienation of the wife's property, during the treaty of marriage, which can be regarded as fraudulent, because the husband was not a party to it. There is no implied contract on her part, during the treaty of marriage, that her property as it existed at the time of the commencement of the treaty should *suffer no diminution*." (m) If the husband has made no inquiries upon the subject before marriage, and has been misled by no false statements and assertions, there is in truth no deception or fraud practised upon him at all, and he has not the slightest ground, in conscience or equity, to set aside the settlement. (n)

If the settlement has been made prior to the treaty of marriage, there is then of course no ground for impeaching it. And if, during the betrothment, the woman announces her intention of making the settlement to her intended husband so as to give him an opportunity of withdrawing from his promise of marriage, and the nuptials are celebrated, the settlement will stand good, as there is not then the slightest pretence for saying that there has been any fraud or deception in the matter. (o) And a husband has no right to disturb a secret settlement made by the wife pending the treaty for the marriage, provided he has by his conduct before marriage, put it out of the power of the wife effectually to make any stipulation for the settlement of her property, by rendering retirement from the marriage on her part impossible. Thus, where a man seduced a girl during the betrothment, and brought her to his house to cohabit with him before marriage, and the girl during the cohabitation made a settlement of

(l) 1 Roper, 165, 166. *England v. Downs*, 2 Beav. 529.

(m) Lord Eldon, 1 Ves. & B. 353; V. C. Wigram, 1 Hare, 613.

(n) *Hunt v. Matthews*, 1 Vern. 408.

(o) *Countess of Strathmore v. Bonves*. 2 Cox, 34; 2 Br. C. C. 350; 1 Ves. 22 s. c. *Slocumb v. Glubb*, 2 Br. C. C. 545, 550. *St. George v. Wake*, 1 Myl. & K. 617, 618. *Cotton v. King*, 2 P. Wms., 358, 674. *Blithe's case*, 2 Freem. 91.

her own fortune to the separate use of herself for life, with remainder to her children in equal shares, to the exclusion of any future husband, and was subsequently married to the man with whom she had cohabited, the court refused to set aside the settlement, saying that the woman committed no fraud upon the husband, if when placed under such circumstances, she took the only means she had left her of protecting herself. (p)

The property intended to be settled upon one or both of the parties to the marriage generally consists of freehold or leasehold property, or money in the funds, and it is, prior to the marriage, conveyed to trustees to be holden by them either for the separate use of the wife, free from the control of the husband, or for the use of the husband and wife jointly, and subsequently of the children of the marriage, with ultimate limitations and provisions, in case there should be no issue. All ante-nuptial settlements made *bonâ fide* in contemplation of the marriage, are good both against the husband and his creditors, and all subsequent purchasers of the property settled. (q) Therefore, whenever it is wished to secure a provision for the wife and children which shall remain unaffected by the subsequent insolvency of the husband, the arrangements should be made before marriage, as great difficulties are likely to interpose themselves in the way of an effectual settlement after marriage.

If a general power of revocation is contained in a settlement of realty, or if the exercise of a power of revocation is made to depend upon the consent of persons who are under the influence and control of the husband, the settlement cannot be supported against the creditors of the husband, nor against subsequent purchasers; (r) but if the exercise of the power is made to depend upon the consent of disinterested third parties, the settlement will be upheld. (s) If the husband reserves to himself the power of charging the land to "the full value," this reservation is tantamount to a general power of revocation, and invalidates the settlement. (t) But powers to sell and exchange lands, and re-invest monies and securities with the consent of trustees, and the usual powers of charging lands to a moderate amount, given *bonâ fide*, will not of course defeat the settlement. (u)

Post-nuptial settlements.—A settlement by the husband, after marriage, of property to the use of his wife and the children of the marriage, will not

(p) *Taylor v. Pugh*, 1 Hare, 608, 616.

(q) *Campion v. Cotton*, 17 Ves. 263.

(r) 27 Eliz. ch. 4, s. 5. *St. Saviour's case*, Lane, 21, 22. *Lavender v. Blakstone*, 2 Lev. 146.

(s) *Buller v. Waterhouse*, 3 Keb. 751.

(t) *Tarback v. Marbury*, 2 Vern. 510.

(u) *Jenkins v. Keymis*, 1 Lev. 150; 1 Rep. 302, &c. Sugden on Powers.

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M. & S. 60.

Eliz. c. 5; 1 Atk. 15. *Ld. Teyn-*
ns, 1 Mod. 119. *Kidney v. Cous-*
ca, 155. *Lush v. Wilkinson*, 5

evidence or badge of fraud to deceive or defraud subsequent creditors, that will be good ; but if any mark of fraud, collusion, or intent to deceive subsequent creditors appears, that will make it void. And I know no case on the 13th of Elizabeth, where a man indebted at the time, makes a mere voluntary conveyance to a child without consideration, and dies indebted, but that it shall be considered as part of his estate for the benefit of his creditors." (a) "The statute is pointed only against fraudulent conveyances, as appears from the preamble : and such conveyances only are thereby invalidated. A conveyance is not fraudulent merely because it is voluntary. A voluntary conveyance may be made of real and personal property, without any consideration whatever, and cannot be avoided by subsequent creditors unless it be fraudulent within the statute. If a person having 1000*l*. a year, and not being indebted at the time, gives away 500*l*. a year, the gift is not fraudulent unless it were made with an intent to defeat subsequent creditors. Its being voluntary is *primâ facie* evidence where the party is loaded with debt at the time, of an intent to defeat and defraud his creditors, but if unindebted his disposition is good." (b) But although a husband may not be in debt at the time he makes the settlement, yet if he becomes indebted to any considerable extent immediately after he has made such a settlement, this is a badge of fraud, and if the settlement is made long after the marriage, and not in pursuance of any agreement to make a settlement prior to the marriage, or in consequence of any sudden or unexpected accession to the wife's fortune, or any unusual circumstance accounting for the making of a post-nuptial settlement, the settlement would probably be considered to have been made by the husband with the intention of subsequently running into debt and defeating the claims of future creditors, and would consequently be deemed to be fraudulent and void. (c) If, however, the settlement contains a provision for the payment out of the settled property of the husband's debts, the settlement cannot then be invalidated. (d)

If the husband, after marriage, conveys his household goods and furniture, cattle, stock in trade, or any other moveable chattels, or money in the funds, to trustees, to be holden by them for the use of his wife and children, and remains, notwithstanding such conveyance, the apparent possessor of the property, and appears to the world as the owner of it, the secret conveyance so made is *primâ facie* a badge of fraud, as it

(a) *Ld. Chancellor Hardwicke*, 2 Ves. sen. 11. *Battersbee v. Farrington*, 1 Swanst. 106.

(b) *V. C. Plumer*, *Holloway v. Millard*, 1 Mad. 419.

(c) 2 Atk. 480. *Taylor v. Jones*, ib. 600.

(d) *Nunn v. Ladbroke*, 8 T. R. 521. *George v. Milbank*, 9 Ves. 194.

enables the husband to obtain a false credit in the commercial world. (e) But the possession by the husband and wife of property, stock in trade, and furniture, limited to the separate use of the wife *before* marriage, is no badge of fraud, and does not render it liable to be seized for the husband's debts. (f)

A post-nuptial settlement made shortly after the marriage, pursuant to an agreement for a settlement entered into before marriage, is as valid and binding as an ante nuptial settlement, and will prevail against the claims both of creditors and purchasers. (g) And so also is a settlement made by the husband in consequence of the relinquishment by the wife of any valuable interest, such as her jointure, or dower, or property over which she has a power of disposition or appointment, (h) or made in consideration of a new portion, or addition to her portion, to be given to the wife by her relations. "The settlement is equally good if made after marriage, provided it be upon payment of money as a portion, or a new additional sum of money, or even an agreement to pay money, if the money be afterwards paid pursuant to this agreement, this is allowed both in law and equity to be sufficient to make it a good and valuable settlement." (i) But the amount and value of the property so settled must not be greatly disproportioned to the value of the consideration received by the husband, or the transaction will, if the husband is indebted at the time, or shortly afterwards becomes insolvent, be considered fraudulent. "If the settlement be just in general, the court does not weigh with exactness the particular advantage gained on the one side or the other; but if the disproportion be so great as would strike any man of common sense with the inadequacy between the settlement and the price given for it, then such circumstances will raise so violent a presumption of fraud as to vitiate the transaction and let in the husband's creditors." (k)

(e) *Twyne's case*, 3 Co. 80; 1 Smith's leadg. cas. 10—14. *Taylor v. Jones*, 2 Atk. 600. *Dewey v. Bayntun*, 6 East, 257. *Arundel v. Phipps*, 10 Ves. 139. *Cadogan v. Kennett*, Cowp. 432.

(f) *Jarman v. Woolleton*, 3 T. R. 618. *Haselinton v. Gill*, ib. 620, n. 3 Doug. 415.

(g) *Griffin v. Stanhope*, Cro. Jas. 454. *Sir Ralph Bovy's case*, 1 Ventr. 194. *Lawender v. Blakstone*, 2 Lev. 147. *Dundas v. Dutens*, 1 Ves. 196.

(h) *Ward v. Skallet*, 2 Ves. senr. 16; Pre. ch. Anon. 102. *Cottle v. Fripp*, 2 Vern. 220. *Lady Arundel v. Phipps*, 10 Ves. 139.

(i) Ld. Hardwicke, 1 Atk. 190. *Russel v. Hammond*, ib. 13. *Colville v. Parker*, Cro. Jas. 158. *Ramsden v. Hylton*, 2 Ves. senr. 308; ib. 18. *Jones v. Marsh*. Cases in equity (temp. Talbot) 64. *Wheeler v. Caryl*, Amb. 121.

(k) 1 Roper, 327; Sugden's Vendors and Purchasers, ch. 21.

SECTION II.

THE MARRIAGE CONTRACT.

Nature and requisites of the marriage contract.—The marriage contract may be defined to be a contract whereby a man and woman mutually promise and agree to cohabit and live together and have sexual intercourse with one another exclusively during their joint lives, for their own enjoyment and happiness, and the procreation and maintenance of children. (a) The contract is founded on the consent of the parties, and ranges amongst that class of contracts called consensual contracts. (b) “‘Consensus non concubitus facit matrimonium,’ the maxim of the civil law, is in truth the maxim of all law upon the subject of marriage, for the concubitus may take place for the mere gratification of present appetite, but a marriage must be an agreement looking to the consortium vitæ. In civil society it becomes a civil contract, regulated and prescribed by law, and endowed with civil consequences. In most civil countries acting under a sense of the force of sacred obligations, it has had the sanction of religion superadded; it then becomes a religious as well as a civil contract.” (c)

The high importance of the marriage contract to the public, as well as to the immediate parties to it, “has required by the known law of this country and of every christian country, that there shall be a publication of banns or previous notification generally to the world that such and such persons are going to be married. This condition is never relaxed but by dispensation in the way of license.” (d)

Marriage by banns.—No parson, vicar, minister, or curate is to be obliged to publish banns of matrimony, unless the persons to be married shall seven days before the time required for the first publication of such banns, deliver, or cause to be delivered to such parson, vicar, minister, or curate, a notice in writing dated on the day on which the same shall be so delivered of their true christian name and surnames, and of the house or houses of their respective abodes within such parish or chapelry, and of the

(a) It is defined by the civil law to be *conjunctio maris et feminae consortium omnis vitæ divini et humani juris communicatio*. Dig. lib. 25, tit. 2, lex. 1. St. Augustin de Nupt. et Concup. lib. 7, c. 9. Pothier *Traité du Mariage*, No. 3. Taylor on

Civil Law, 264.

(b) Dig. lib. 23, tit. 2, Lex. 1.

(c) Sir Wm. Scott, *Dalrymple v. Dalrymple*, 2 Hag. Consist. 63.

(d) Sir Wm. Scott, 3 M. & S. 260, n.

time during which they have dwelt, inhabited, or lodged in such house or houses respectively. (4 Geo. 4, c. 76.)

Publication of banns.—All banns of marriage are to be published in an audible manner in the parish church, or in some public chapel in which banns may be lawfully published, of the parish or chapelry wherein the persons to be married shall dwell, according to the form of words prescribed by the rubric, upon three Sundays preceding the solemnization of marriage, during the times of morning or of evening service (if there shall be no morning service) immediately after the second lesson; and when the persons to be married dwell in different parishes or chapelries, the banns are to be published in the church or chapel of each parish or chapelry; and the marriage must be solemnized in the church or chapel where the publication has been made.

Extra-parochial districts.—And places having no public chapel where banns may lawfully be published are to be deemed and taken for the purpose of marriage to belong to the adjoining parish or chapelry, and the banns may be published in the adjoining parish or chapelry, as if either of the persons to be married had dwelt therein. If a church or chapel in which marriages have been usually solemnized is demolished to be rebuilt, or is under repair and disused on that account, the banns of the parishioners of that parish may likewise be proclaimed in the church or chapel of any adjoining parish or chapelry in which banns are usually proclaimed, or in any place licensed by the bishop of the diocese for the performance of divine service during the restoration or rebuilding of such church or chapel.

If either of the parties to be married are minors, (s. 8,) and the parents or guardians of such minors, or one of them, openly and publicly declares, or causes to be declared, his or their dissent to the marriage at the time of the publication of the banns, the banns are absolutely void. And if the marriage is not celebrated within three months after the complete publication of banns, no minister can proceed to the solemnization of the marriage until the banns have been re-published on three several Sundays in the form and manner prescribed by the act, or a license has been obtained.

Marriage by license from the ordinary.—A license from the ordinary is a legal authority and direction to a clergyman to solemnize a marriage at once without any publication of banns. It can only be granted by the Archbishops of Canterbury and York, and by the bishops or ordinaries exercising episcopal jurisdiction to persons resident within their several dioceses. And the recent Marriage Act of 4 Geo. 4, c. 76, has provided,

(s. 10,) that no license shall be granted by them to solemnize marriage in any other church or chapel than in the parish church, or in some public chapel of the parish or chapelry within which the usual place of abode of one of the persons to be married shall have been for the space of fifteen days immediately before the granting of such license. And for avoiding all fraud and collusion in obtaining licenses, it is enacted, (s. 14,) that before any license is granted, one of the parties shall personally swear before the surrogate or person having authority to grant the license, that he or she believeth that there is no impediment of kindred or alliance nor any other lawful cause; nor any suit commenced in any ecclesiastical court to bar or hinder the celebration of the marriage according to the tenor of the license, and that one of the parties hath, for the space of fifteen days immediately preceding such license, had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnized; and where either of the parties, not being a widow or a widower, shall be under the age of twenty-one years, that the consent of the parents or guardians has been obtained according to the provisions of the act; and if there be no parent or guardian, or person authorized to give consent, oath to that effect is to be made by the party requiring the license, and the license may then be granted without such consent. No bond, caution, or security of any description can be lawfully taken (s. 15) prior to the grant of the license.

But if either of the parties is under age, and not a widow or widower, and any false oath is taken, and a license procured by means thereof, the guilty party, in addition to the other pains and penalties^(e) which may result therefrom, is to forfeit all property accruing from the marriage, provided proceedings are taken within one year from the solemnization thereof, (s. 23, 24,) and the property so forfeited is to be settled upon the other party to the marriage, if innocent of the fraud, and if not, upon the children of the marriage. ^(f) Any person forging, or altering, or uttering a license of marriage, knowing the same to be forged or altered, is guilty of felony, and may be transported for life. ^(g)

Of the consent of parents and guardians.—If the party proposing to marry is a minor, and not a widow or widower, the consent of the father of such party, if living, must be obtained. (s. 16) If the father is dead, the consent of a guardian is required; and if there be no guardian, the consent of the mother, provided she is unmarried. If there is no mother unmarried the consent of the guardians (if any) appointed by the Court

(e) *Rea v. Foster*, Russ. & Ry. 459.

M. & R. 230, s. c.

(f) *Rea v. Birmingham*, 8 B. & C. 29; 2

(g) 11 Geo. 4 and 1 Wm. 4, c. 66, s. 20.

of Chancery must be procured, and if there be no such guardian, and no person authorized by law to give or withhold consent, then the license is to be granted without it. If the parent or guardian whose consent is required is *non compos mentis*, or beyond sea, or unreasonably or from undue motives refuses his consent, the minor, desirous of marrying, must apply by petition to the Lord Chancellor, Lord Keeper, &c., or the Master of the Rolls, or the Vice-Chancellor, either of whom is empowered to proceed upon the petition in a summary way, and judicially declare whether the marriage ought or ought not to take effect.

The consent of parents and guardians in the case of marriages is required by the Roman law with as much strictness as in our own law. "Reason, both natural and civil," observes the emperor in the Institutes, "persuades us that the consent of parents should precede marriage. Hence it became a question, whether the son of a madman could contract matrimony, and as the opinions of lawyers differed, we proclaimed our decision by which the son as well as the daughter of a madman is permitted to marry without the intervention of the father, according to the form promulgated by our constitution." (h)

If the requisite consent has not been obtained, or any impediment to the marriage exists, a caveat may be entered against the grant of the license. This caveat must be signed by or on behalf of the person who enters the same, with the addition of his place of residence and the ground of the objection on which the caveat is founded, and when it has been so signed and entered, no license is to issue, (s. 11,) until the caveat or a true copy thereof has been transmitted to the judge out of whose office the license is to issue, and until the judge has certified to the register that he has examined into the matter of the caveat, and is satisfied that it ought not to obstruct the grant of the license, or until the caveat has been withdrawn by the party who entered it.

If the marriage is not celebrated within three months after the grant of the license, no minister is to proceed (s. 19) to solemnize the marriage until a new license has been obtained, or banns have been duly published according to the provisions of the act.

Marriage by special license.—The stat. 25 Hen. 8, c. 21, authorizes the Archbishop of Canterbury, his successors, and the guardians of the spiritualities during a vacancy of the archbishoprick, to grant faculties, dispensations, and licenses as the pope had done before, and enacts that all children procreated after solemnization of marriage by virtue of a

(h) Instit. lib. 1, tit. 10.

license or dispensation from the said archbishop, shall be taken to be legitimate in all courts of justice and other places, and inherit the inheritance of their parents and ancestors. This power is expressly reserved to the archbishop intact by the recent marriage acts. (i) Special licenses for the marriage of parties, "at any time in any church or chapel or other meet and convenient place," seem to be regarded in the light of particular favours to be granted only to persons of rank and condition, and are procurable only by those who have a certain amount of influence in high quarters.

Marriage by certificate, and license from the registrar.—By the 6 & 7 Will. 4, c. 85, it is enacted, that where, by any law or canon in force before the passing of the act, marriages may be solemnized after the publication of banns, they may be solemnized in like manner by the production of the registrar's certificate, and in order to obtain this certificate, the parties must give notice (s. 4) of the intended marriage to the superintendent registrars of the districts within which they have dwelt for not less than seven days next preceding, stating their names and surnames, their profession or condition in life, their respective dwelling-places, the length of time that they have been resident in their several districts, and the church or registered building in which the marriage is to be solemnized. If either party has dwelt in the place stated in the notice during more than one calendar month, it may be stated therein that he or she hath dwelt there one month and upwards.

Printed forms of these notices may be obtained from the superintendent registrar's office.

The notices are to be filed by the superintendent-registrar, and copies of them are to be entered in a book to be called "the marriage notice book," which is to be open to the inspection of the public without fee.

These notices are, moreover, to be transmitted to the clerk of the guardians of the poor-law union of the district, and be read by him "three several times in three successive weeks at the weekly meeting of the guardians," unless in any case a license for the marriage shall be sooner granted, and notice thereof given to such clerk. If the board of guardians do not hold meetings in every week, it will be sufficient if the notice is read at any meeting holden within twenty-one days from the day of the entry of the notice.

After the expiration of seven days from the entry of the notice, if the marriage is to be solemnized by license from the registrar, or of twenty-

(i) 4 Geo. 4, c. 76, s. 20; 6 & 7 Wm. 4, c. 85, s. 1.

one day if it is to be solemnized without license, the superintendent-registrar is to issue (s. 7) under his hand, at the request of the party giving the notice, if no lawful impediment stands in the way, and there is no prohibition on the part of the parents and guardians, a certificate stating the particulars set forth in the notice, the day on which the notice was entered, and that the full period of seven days, or of twenty-one days, as the case may be, has elapsed since the entry of such notice, and that the certificate has not been forbidden.

The issue of the certificate may be prevented (s. 9) by the parent or guardian, or person having a right to forbid the marriage, putting the word "forbidden" opposite to the entry of the notice in the marriage notice-book, with the addition of his or her name and place of abode, and of the character (s. 10) in which he or she forbids the marriage.

Marriage licenses from the registrar.—The superintendent-registrar is authorized (s. 11) to grant licenses for marriage in any building registered for the celebration of marriages within his district, on receiving a fee of 3*l.* in addition to the value of the stamps required to be affixed to such licenses: but he has no power or authority to grant licenses for marriage in any church or chapel in which marriages may be solemnized according to the rites of the Church of England, or in any church or chapel belonging to the Church of England, or licensed for the celebration of divine service according to the rites and ceremonies of the Church of England, or any license for marriage in any registered building not within his district.

Before the license can be granted in any case, one of the parties intending to marry must appear personally (s. 12) before the superintendent registrar, and in case no notice has been given to the latter of the intended marriage, he must deliver to him the certificate of the superintendent-registrar, to whom notice has been given, and such party shall take an oath or make an affirmation, that he or she believeth that there is not any impediment or hindrance to the marriage, that one of the parties hath had his or her usual place of abode within the district in which the marriage is to be solemnized, and that the consent of parents and guardians has been obtained where such consent is required.

All such licenses and affirmations, or declarations, are liable to the same stamp duties as licenses granted by the ordinary of any diocese, and the affidavits made in order to procure the same.

The registrar-general is to furnish (s. 8) every superintendent-registrar with forms of certificates; and, in order to distinguish the certificates to be issued for marriages without license, a water-mark, in the form of the word

"license" in Roman letters, is to be made in the substance of the paper of the certificates for marriage by license; and every such certificate is, moreover, to be printed in red ink, whilst the certificates for marriage without license are to be printed in black ink, and are to possess such other distinctive marks as the registrar may think fit to give them.

A caveat against the grant of the certificate or license may be entered on payment of a fee of 5s. It must be signed by the person who enters the same, must set forth his or her place of residence, and the ground of objection on which the caveat is founded. After entry thereof no certificate or license is to issue until the superintendent-registrar has examined the objection and overruled it, or until the caveat has been withdrawn by the party who entered it. In cases of doubt the matter may be referred to the registrar-general for decision; and if the superintendent-registrar refuses the certificate or license, an appeal lies to the registrar-general. And it is provided and declared that every person vexatiously entering a caveat on grounds which the registrar-general shall declare to be frivolous, shall be liable (s. 37) to an action for damages at the suit of the party against whose marriage the caveat has been entered, (k) and every person who forbids the issue of any superintendent-registrar's certificate, by falsely representing himself or herself to be a person whose consent is required to the marriage, knowing at the time that the representation is false, is to suffer (s. 38) the penalties of perjury.

No marriage is to be celebrated (s. 14) after notice until after the expiration of twenty-one days after the day of the entry of the notice, unless the registrar's license has been obtained, and no marriage is to be solemnized with license until after the expiration of seven days after the day of the entry of the notice. And whenever the marriage is not celebrated within three calendar months after the entry of the notice, the notice and certificate and license are (s. 15) utterly void, and no person is to proceed to solemnize the marriage, nor is any registrar to register the same, until a new notice has been given, entry made, and certificate thereof granted in the manner previously provided; and any superintendent-registrar, who knowingly and wilfully issues any license after the expiration of three calendar months after the entry of the notice, or who knowingly and wilfully solemnizes, or permits to be solemnized in his office, any marriage declared to be null and void by the act, is guilty of felony. (l)

Appointment of registrars, and registration of buildings for the cele-

(k) As to the evidence in such action, see 7 Wm. 4, and 1 Vict. c. 22, s. 5.

(l) 7 Wm. 4, and 1 Vict. c. 22, s. 3.

bration of marriages.—Any person possessed of certain qualifications specified by the act, may be appointed (s. 17) by the superintendent-registrar of any union or parish, with the consent of the board of guardians thereof, for the purpose of being present at marriages solemnized under the act, and at which the presence of a registrar is made necessary: and any buildings certified by twenty householders (s. 18) to have been used by them during one year at the least, as their usual place of public religious worship, may be registered as a building for the solemnization of matrimony therein. And if any registered building has been disused as a place of religious worship, and the congregation removed to a new building, such new building may be registered and substituted in the place of the former.

Punishment of clergymen and registrars for unlawfully solemnizing marriages.—If any person solemnizes matrimony in any other place than a church or chapel wherein banns may be lawfully published, or a building registered under 6 & 7 Wm. 4, c. 85, or the registrar's office, or at any other time than between the hours of eight and twelve in the forenoon, unless by special license from the Archbishop of Canterbury; or without due publication of banns, and without license; or if any person falsely pretending to be in holy orders, solemnizes matrimony according to the rites of the Church of England, the party so offending is, on conviction, to be transported as a felon for fourteen years, provided the prosecution has been commenced within three years from the commission of the offence.^(m) And if any superintendent-registrar knowingly and wilfully issues any certificate for marriage contrary to the provisions of the act of 6 & 7 Wm. 4, c. 85, or who knowingly and wilfully registers or solemnizes, or permits to be solemnized in his office, any marriage by that act declared to be null and void, is guilty of felony, and may be prosecuted at any time within three years from the commission of the offence.⁽ⁿ⁾

PERFORMANCE of the MARRIAGE CEREMONY.—If the marriage is by special license, or by license from the ordinary, the license authorizing the marriage must be presented to some clergyman of the established church, who is bound on the requisition of the parties to solemnize the marriage without delay, unless there is some fair and reasonable ground for doubt as to the identity of the parties named in the license or some material alteration in the name has been discovered.^(o) If the parties desire to be married pursuant to the superintendent-registrar's certificate, but according to the rites of the Church of England, they must, if they both reside in the

(m) 4 Geo. 4, c. 76, s. 21.

(n) 6 & 7 Wm. 4, c. 85, s. 40.

(o) *Kwing v. Wheatley*, 2 Hag. Consist. 185, 186.

same district, present (s. 16) the certificate to the officiating minister. If they reside in different districts, and have given notice to different superintendents, the certificate of each superintendent must be presented to the minister. If the parties are Quakers, and desire the marriage to be solemnized according to the usages of Quakers, the certificate or license is to be delivered to the registering officer of that class of persons. If the marriage is a Jewish marriage, it must be delivered to the registering officer of a synagogue, and in all other cases, when the marriage is between dissenters, or the parties do not desire to have it solemnized according to the rites of the Church of England, it must be delivered to the registrar present at the marriage in the manner presently described. After the certificate has been duly presented, the marriage may be solemnized in any registered building between the parties described in the notice and registrar's certificate, according to such form and ceremony (s. 20) as they may see fit to adopt, provided the marriage is celebrated with open doors between the hours of eight and twelve in the forenoon, in the presence of some registrar of the district in which the registered building is situate, and of two or more credible witnesses, and provided that in some part of the ceremony, and in the presence of the registrar and witnesses, each of the parties shall declare as follows:—"I do solemnly declare that I know not of any lawful impediment why I may not be joined in matrimony to —," and each of the parties shall say to the other, "I call upon these persons here present to witness that I, —, do take thee, —, to be my lawful wedded wife, or husband, as the case may be." It provided, also, (s. 21) that any persons who object to marry in any such registered building, may, after due notice and certificate issued, contract and solemnize marriage at the office, and in the presence of the superintendent-registrar, and some registrar of the district, and in the presence of two witnesses with open doors, and between the hours of eight and twelve, making the declaration and using the form of words prescribed for marriages in registered buildings.

When the marriage is celebrated according to the rites of the established church, the parties mutually promise in the presence of the minister and the congregation, to take each other as husband and wife, and live together after God's ordinance in the holy estate of matrimony. "The husband promises on his part 'to love, comfort, honour, and keep his wife,' and the wife on hers, 'to obey, serve, love, honour, and keep her husband,' in every variety of health, fortune, and condition," and both stipulate to forsake all others, and to keep only unto one another so long as they both shall live. This promise is called the marriage vow; is witnessed before God and the congregation, accompanied with prayers to the Almighty for

his blessing upon it; and attended with such circumstances of devotion and solemnity as place the obligation of it, and the guilt of violating it, nearly upon the same foundation with that of oaths." (*p*)

The consent of parents or guardians was, by 26 Geo. 2, c. 33, and 4 Geo. 4., c. 17, made essential to the validity of all marriages of minors by license, (not being widowers or widows who were deemed to be emancipated,) so that after a marriage had been actually celebrated and consummated, and followed by the procreation of children, and a lengthened cohabitation, it might be annulled by the ecclesiastical court, and declared void *ab initio* by reason of the want of such consent prior to the celebration of the nuptials. (*q*) But this state of the law was found to operate with such severity upon the innocent issue of the parties, to be productive of so much fraud and injustice on the part of the stronger towards the weaker sex, (the marriage being constantly annulled at the suit of the very party by whose fraud the license had been obtained,) that these acts were repealed, and it has now been enacted, that if, notwithstanding the precautions taken, a party being a minor, does actually succeed in getting the marriage ceremony performed, the marriage shall not be accounted void by reason of the non-consent of parents and guardians, or of any person whose previous consent was required by law, and that evidence of the absence of such consent shall not be admissible in evidence in any suit touching the validity of the marriage. (*r*) When, indeed, the marriage has been actually celebrated and consummated, the mischief is done, and it would, in general, be only making a bad matter worse to annul the marriage, and inflict public disgrace upon the woman, and scandal upon society by bastardizing the issue. The only party to whom such a proceeding would, in general, be acceptable, is the man who has been the author and cause of the wrong done.

It is provided also, that after the marriage has been actually solemnized, it shall not be necessary in support of such marriage to give any proof of the residence of the parties previous to the marriage, according to the requirements of the several marriage acts, and that no evidence shall be admitted in any suit touching the validity of any marriage to show that the provisions as to residence had not been complied with. (*s*)

By 7 & 8 Vict., c. 57, s. 4., it is recited, that banns have been published and marriages solemnized in chapels, with districts assigned them,

(*p*) Paley's Moral Philosophy, 150.

(*q*) *Johnson v. Parker*, 3 Phill. 41, ib. 45.

(*r*) 6 & 7 Wm. 4. c. 85. s. 25; 4 Geo. 4. c. 76, ss. 16, 22, 23. *Rex v. Birmingham*, 8 B. & C.

29; 2 M. & R., 234.

(*s*) 4 Geo. 4, c. 76, s. 26; 6 & 7 Wm. 4, c. 85, s. 25.

under the church building acts, in which banns could not be legally published, nor marriage by law be solemnized, and that it is expedient to remove all doubts touching the validity of such marriages, and enacts consequently that all marriages that have been so solemnized shall not thereafter be questioned, and that the registers and copies of the registers of such marriages shall be received in evidence in all courts of law and equity.

Of the age of consent of the parties to the marriage contract.—“The age of consent to marriage is fourteen in males and twelve in females. If, however, a boy under fourteen, or a girl under twelve actually go through the form of marriage, such marriage is not absolutely void; it is inchoate and imperfect only. If, on arriving at the age of consent, they cohabit, or continue a cohabitation previously begun, the marriage is a good marriage by reason of the subsequent ratification of the contract. “The time of agreement or disagreement when they marry *infra annos nubiles* is, for the woman, at twelve or after, and for the man, at fourteen or after, and there need no new marriage if they so agree; but disagree they cannot before the said ages, and then they may disagree and marry again to others without any divorce, and if they once after give consent they can never disagree after.” (t) In the Roman law also, parties were marriageable as soon as they arrived at the age of puberty. (u)

Void marriages.—All marriages celebrated after the 31st of August, 1835, between persons within the prohibited degrees of affinity (x) are absolutely void. (y) If a widower, therefore, goes through the marriage ceremony with the sister of his deceased wife, or the widow with the brother of her deceased husband, the ceremony is a mere form and will be productive of no legal marriage between the parties in this country. (z) A nephew by affinity, or son of a sister of a widow's former husband, is within the prohibited degrees, and so consequently is the daughter of the sister of a deceased wife. (a)

If any persons *knowingly and wilfully* intermarry in any other place than a church or chapel, or registered building, or the registrar's office, without a special license from the Archbishop of Canterbury, or without due publication of banns, or license from a person or persons having

(t) Co. Litt. 79 a, 79 b; 1 Rolle Abr. 241. *Arnold v. Earle*, 2 Lee, 531. Dig. lib. 23, tit. 2, lex 4.

(u) *Iustus autem nuptias inter se cives Romani contrahunt, qui secundum præcepta legum coeunt, masculi quidem puberes, feminae autem viri potentes.* Instit. lib. 1, tit. 10.

(z) 25 Hen. 8, c. 22. ss. 3, 4; 28 Hen. 8,

c. 7, s. 7, 10, 11; 32 Hen. 8, c. 38; 2 & 3 Ed. 6, c. 23; Gibb. Cod. 413.

(y) 5 & 6 Wm. 4, c. 54. *Shelford on Marriage*, 154—183.

(z) *Ray v. Sherwood*, 1 Curt. 173, ib. 34. *Augustie v. Augustie*, 1 Phill. 201.

(a) *Elliott v. Gurr*, 2 Phill. 16; *Clement v. Beard*, 5 Mod. 448; *Noy*, 29; Co. Litt. 235.

authority to grant the same, or without due notice to the superintendent registrar, or without certificate of notice duly issued, or without license, or in the absence of a registrar or superintendent registrar, where the presence of a registrar or superintendent registrar is necessary, the marriage of such persons is absolutely null and void. (b) But it must be shown that *both* parties have knowingly and wilfully disregarded the provisions of the marriage acts. If the disobedience and misconduct are on one side only, the marriage is not invalid. (c) In the case of marriage by banns, for example—the banns are not *duly* published unless the true names of both parties are given and published in the church or chapel. And if a false name is given with the knowledge of both parties for the purpose of deceiving the parents or guardians, or any person entitled to give or withhold his consent to the marriage, the marriage held in pursuance of such false and fraudulent banns is absolutely void. (d) But no court of justice, ecclesiastical or civil, would lend its aid to enable a man who had concealed his true name at the time of the publication of the banns, or had purposely procured the banns to be published in false names without the knowledge of the woman he was about to marry, to turn round upon her and annul the marriage and bastardize his children on the ground that HE had knowingly and wilfully evaded the provisions of the marriage acts.

Thus, where James Carpenter prevailed upon Susan Spencer to marry him, and told her he would see the banns properly published, and she accordingly left the matter to him, and he afterwards procured the banns to be published in the names of James Carpenter and Agnes *Watts*, and she was married in the name of Agnes Watts, but the clergyman in performing the service called her Agnes, and she did not know until after the marriage had been solemnized and consummated that the banns had been published in a wrong name, and that she had been married in a wrong name; the Court of Queen's Bench held that she was, notwithstanding the misnomer, the lawful wife of the said James Carpenter. (e) A man would not be permitted in the ecclesiastical court any more than in a court of common law, to take advantage of his own wrong, and avail himself of his own fraud to the injury of the party whom he has deceived. If a man has fraudulently altered or suppressed a name, observes Sir William Scott, "without the knowledge of the other party, it would be hard to hold the marriage void as against the innocent party." (f)

(b) 4 Geo. 4., c. 76, s. 22; 6 & 7 Wm. 4., c. 85, s. 42.

(c) *Wright v. Elwood*, 1 Curt. 49, 662.

(d) *Farguharson v. Farguharson*, 3 Addams, 282. *Willshire v. Prince*, 3 Hag. 332. *Tongue v. Allen*, 1 Curt. 38; 1 Moore, 90. *Frankland v. Nicholson*, 3 M. & S. 260, n. *Pouget v. Tom-*

kyns, ib. 262, n. *Mather v. Ney*, ib. 265. *Allen v. Wood*, 4 M. & Sc., 514. 1 Bing. n. c. 8. *Rex v. St. Faith's Newton*, 3 D. & R. 351.

(e) *Rex v. Wroxtton*, 4 B. & Ad. 640; 1 N. & M., 712, s. c. *Ld. Ellenborough. Rex v. Billinghamurst*, 3 M. & S. 257.

(f) *Pouget v. Tomkins*, 3 M. & S., 264, n.

If he has imposed a pretended clergyman and a supposititious license upon a young unmarried woman, the ecclesiastical court would not at *his* instance annul the apparent marriage, and enable him to reap the fruit of so detestable a fraud. If the license were false it might be considered that "the same principle which in favour of innocent parties supports the act of a pretended clergyman, (post 608,) might be invoked to uphold the authority of a supposititious instrument of license obtruded upon a party deceived by so cruel a fraud; for it can as little be expected that a young woman should ascertain the authenticity of the instrument under which her marriage is to pass, as the ordination of the minister who is to perform it." (g)

If a man knowingly and wilfully procures a license from a person who has no authority to grant the license, and gets a clergyman to celebrate the marriage pursuant to the apparent license, the ecclesiastical court will not declare the marriage to be void if it appears that the woman was not cognizant of the illegality of the license at the time of the marriage. (A) A mere misdescription, or misnomer of the parties in the license, will not avoid the marriage. But if any fraud or intentional deception has been practised with the knowledge and connivance of *both* parties upon the ordinary, "if a license were obtained for one person with the intention that it should be used for another, such a license would not be valid." (i)

"It is a generally accredited opinion, that if a marriage is had by the ministration of any person in a church, who is ostensibly in holy orders, and is not known or suspected by the parties to be otherwise, such marriage shall be supported. Parties who come to be married, are not expected to ask for a sight of the minister's letters of orders; and if they saw them, could not be expected to inquire into their authenticity." (k) But if persons professing to marry according to the rites of the Church of England, knowingly or wilfully consent to, or acquiesce in, the solemnization of such marriage by any person not being in holy orders, the marriage is null and void to all intents and purposes whatsoever." (l)

If one of the parties to the marriage contract has assumed a false name and description, and procured the publication of the banns and the celebration of the marriage in such false name, for the purpose of concealing his or her real estate and condition in life, the other party who has been deceived, and who has thus been induced to go through the marriage cere-

(g) Sir Wm. Jones. *Hawks v. Corri*, 2 Hag. Consist., 288, 289.

(A) *Dormer v. Williams*, 1 Curt. 870.

(i) *Lane v. Goodwin*, 4 Ad. & E., n. s. 866. Sir Wm. Scott. *Cope v. Burt*, 1 Hag. Consist.

438. *Clowes v. Clowes*, 3 Curt. 191.

(k) Sir Wm. Scott, *Hawks v. Corri*, 2 Hag. 288, 289.

(l) 4 Geo. 4, c. 76, s. 22.

mony with a person who is substantially a different person from what was thought and expected at the time, is entitled to a declaration of the nullity of the marriage from the ecclesiastical court. (*m*) If the error is not a mere error *nominis*, or misnomer, but an error *de corpore*, or *de personâ*, the contract is void as to the party who has been deceived, from want of consent; but if it is a mere misnomer, and the party has married the person that he or she all along intended to marry, the mere verbal mistake will not of course suffice to invalidate the marriage. (*n*)

Whenever any attempt is to be made to invalidate a marriage, parties must not slumber over their rights, for "everything is to be presumed in favour of a matrimonial union which has produced children, and united parties by a long cohabitation; such an union is not to be dissolved, unless by some pressing obligation of law." (*o*)

SECTION III.

LIABILITIES RESULTING FROM ACTUAL AND REPUTED MARRIAGES. (Ante, 336—348.)

Liability of the husband upon contracts made by the wife before marriage.—If an action has been commenced against the wife prior to the marriage, the coverture will not abate the action, but the plaintiff may proceed to judgment, and issue execution against the wife, without taking any notice of the husband. (*a*) The person or property of the latter cannot of course be touched under such a judgment or such an execution; and if the wife is taken and incarcerated, the courts will in general discharge her, if she has no separate property of her own. (*b*) If the husband himself is sought to be implicated in the consequences of the judgment, it must not be executed against the wife, but a *scire facias* must be sued out thereon against the husband and wife, and a joint judgment recovered against them both; and upon this joint judgment execution may be taken out against the husband. If the wife dies before a joint judgment is recovered, the husband is discharged; (*c*) but if she dies after judgment

(*m*) *Frankland v. Nicholson*, 3 M. & S. 261, n. *Wyatt v. Henry*, 2 Hag. Consist. 215.

(*n*) *Clowes v. Clowes*, 3 Curt. 190. Notes on Ecclesiastical Cases, vol. 1, p. 1, s. c. *Rex v. Burton on Trent*, 3 M. & S. 538.

(*o*) Sir Wm. Scott, *Diddear v. Faucit*, 3 Phil. 581. *Mayhew v. Mayhew*, 2 Phil. 13. *Clowes v. Clowes*, 3 Curt. 190.

(*a*) *King v. Jones*, 2 Str. 811. *Cooper v.*

Hunchin, 4 East, 521. *Doe v. Butcher*, 3 M. & S. 557. *Chalk v. Deacon*, 6 Moore, 128.

(*b*) *Ferguson v. Clayworth*, 6 Ad. & R., n. s., 269; 2 D. & L. 165. *Banin v. Jones*, 3 D. & L., Law J., n. s.

(*c*) Both at law and in equity, 1 Rolle Abr. 351, G. pl. 2. *Earl of Thomond v. Earl of Suffolk*, 1 P. Wms. 469. *Heard v. Stamford*, 3 P. Wms. 409; 1 Bolfe Abr. 351, pl. 2.

has been obtained, the husband remains liable, and a writ of execution may be issued thereon against him, notwithstanding her decease. If the wife, prior to the marriage, was discharged under the Insolvent Debtor's Act, such discharge may be pleaded as an answer to the action. (*d*)

We have already seen that the husband is entitled, during the continuance of the coverture, to the benefit of the performance of all contracts that have been previously entered into by the wife; (*e*) he ought naturally, therefore, to be made to bear the burthen of them. Having obtained possession by the marriage of all the wife's property, and choses in action, (if she has any,) the law looks to him as the party properly responsible for the fulfilment of the engagements made by her prior to the marriage, and which have not been barred by the Statute of Limitations. Therefore, if a feme sole executes a bond, or accepts or makes a promissory note, or a bill of exchange, and then marries, the husband may be sued thereon, together with the wife. (*f*) But the husband cannot be sued alone upon contracts made by the wife before marriage, because they are not his contracts; (*g*) neither can the wife be sued separately from the husband upon them after the coverture has commenced, and during its continuance; (*h*) and therefore, if a plaintiff brings an action, and recovers judgment against a feme covert as if she were a feme sole, the husband may avoid it by writ of error. (*i*) The coverture may also, during the pendency of the action, be pleaded in abatement. (*k*) But if the action be brought against the husband and wife jointly, and judgment is recovered against them both in the wife's life-time, execution may then be issued thereon against the husband, and he may thus be compelled to fulfil his wife's contract made before marriage, or discharge and satisfy the wife's debt. Therefore, if the husband and wife are both sued on the wife's bond made before marriage, and judgment is had thereupon, and the wife dies before execution, yet the husband is liable, and execution may be sued out against him, because the judgment hath altered the debt. (*l*) But if the wife dies during the pendency of the action, and before a joint judgment has been obtained against them both, the husband is discharged. (*m*)

(*d*) *Storr v. Lee*, 1 P. & D. 633. *Lockwood v. Salter*, 5 B. & Ad. 312.

(*e*) Ante, 336, 337.

(*f*) As to the form of declaration in such an action, see *Morris v. Norfolk*, 1 Taunt. 212.

Pittam v. Forster, 1 B. & C. 248; 2 D. & R. 90.
(*g*) *Drue v. Thorne*, Aleyn, 72. *Robinson v. Hardy*, 1 Keb. 281. *Mitchinson v. Hewson*, 7 T. B. 348.

(*h*) *Beard v. Webb*, 2 B. & P. 93.

(*i*) *Hayward v. Williams*, Sty. 280. *Haydon v. Miller*, 2 Rolle, 53.

(*k*) *Milner v. Milnes*, 3 T. R. 631.

(*l*) *Eggs v. Coward*, Sid. 337. *O'Brien v. Ram*, 3 Mod. 186.

(*m*) Bac. Abr. *BARON* and *FEME*. (*F*). Ante, 348.

This liability upon contracts made by the wife before marriage, arises in all cases, whether the husband had any portion with the wife or not; and this the law presumes reasonable, because by the marriage the husband acquires an absolute interest in the personal estate of the wife, and hath the receipt of the rents and profits of her real estate during coverture, and whatever accrues to her by her labour or otherwise during the coverture, belongs to her husband; so that in favour of creditors, and that no person's act should prejudice another, the law makes the husband liable to those debts with which he took her attached. (*n*)

Liability of the husband upon contracts made by the wife during marriage.—The wife has no authority to contract by deed for the husband, so as to bind the latter, and he cannot therefore be sued upon any contract under seal entered into and executed by the wife in his name, or on his behalf, unless he has given her a power of attorney under seal to contract for him by deed. Neither is the wife herself liable upon the deed by reason of her coverture.

A married woman has no power of entering into any description of contract during the coverture on her own account, so as to incur any legal liability thereon, (*o*) although she is entitled, as we have before seen, (*ante*, 387,) to sue, together with the husband, upon covenants that may have been entered into with her. If a deed executed by a married woman be a deed poll, "it is absolutely void *ab initio*, and the coverture which shows the deed to be void, is good evidence under the plea of *non est factum*." (*p*) And if it be a deed, *inter partes*, entered into by the wife in her own name of the one part, and the plaintiff of the other part, the covenants therein entered into by the wife cannot be enforced either against her or her husband, although the covenants that may be entered into *with* her by the other party to the deed may, as we have already seen, be enforced as against him in a joint action by the husband and wife. (*q*)

But in order that the party who has entered into this anomalous and one-sided engagement, rendering himself liable to be sued by the husband and wife, but giving him no remedy against them or either of them, may not have all the burthen of the performance of it without any of the corresponding benefits, the law gives him a right to sue the husband upon a

(*n*) Bac. Abr. BARNON and FARM (F). *Ante*, 335—348.

(*o*) A married woman is by the civil law disabled from contracting, either on her own account or for her husband. Frustra disputas de contractibus cum marito tuo habitis, utrumne jure steterint an minime; cum tibi sufficiat, si proprio nomine nullum contractum habuisti, quominus pro marito tuo conveniri possis. Cod.

lib. 4, tit. 12, lex 1.

(*p*) Lord Ellenborough, *Lambert v. Atkins*, 2 Campb. 273. *Lynch v. Hooks*, 1 Salk. 7. *Cole v. Delawn*, 3 Keb. 228. *James v. Forbes*, 12 Mod. 101; Com. Dig. (Pleader); 2 W. 18 *Ex parte Brady*, 8 Dowl. P. C. 337.

(*q*) *Ante*, 387. *Bendix v. Wakeman*, 12 M. & W. 97.

quantum meruit, for a reasonable compensation for anything done under the deed, just the same as if it had never been made. If, for example, he has performed work or labour, or rendered services, or supplied goods upon the faith of a covenant for payment or remuneration therein contained, he is entitled to sue the husband for the fair value of the work and services, and of the goods supplied, just as if the covenant had never been in existence.^(r)

SIMPLE CONTRACTS.—The liability of the husband upon simple contracts entered into by the wife during the coverture, depends upon the nature of such contracts, and of the things stipulated and agreed to be done. No power of attorney is requisite to enable the wife to bind the husband by simple contract; but the latter will be held liable, provided he appears to have expressly or impliedly sanctioned what she has done.^(s) If the husband has entrusted the wife with the general management of his trade or business, he makes her his general agent for the carrying of it on, and clothes her with an implied authority to enter into all such contracts and agreements as are usual and necessary for the purpose; and he is consequently responsible for the fulfilment of all contracts that may be entered into by her in the execution of her task, just as if they had been made by any ordinary general agent employed by him in the matter.^(t)

Bills of exchange and promissory notes, for example, drawn, accepted, or indorsed by a wife, who is entrusted by the husband with the conduct and management of a business, in the carrying on of which it is usual to negotiate such securities, are binding upon the husband, just as much as if he had put his own name to them, by reason of the implied authority resulting from the nature of the employment. But a wife has not in general any implied power or authority to bind her husband, by making or indorsing such securities. If she is not carrying on the husband's business under his roof, it must be shown that she acted by his express authority.^(u) If no authority from the husband can be shown, the instrument is void as against him; and it cannot be enforced, as we have already seen, against the wife, by reason of the coverture, and her inability to contract on her own account during the continuance of the marriage.

^(r) *Whits v. Cuyler*, 1 Esp. 200; 6 T. B. 176; ante, 215.

^(s) *M'George v. Egan* 7 Sc. 112.

^(t) *Petty v. Anderson*, 10 Moore, 577; 2 O. & P. 38, s. c. *Smallpiece v. Daves*, 7 C. & P. 40.

^(u) *Prestwick v. Marshall*, 5 M. & P. 513; 7 Bing. 565, s. c. *Cotes v. Davis*, 1 Camp. 485.

Bishop v. Barlow, 1 East, 434. *Att. Gen. v. Riddle*, 2 C. & J. 493; 2 Tyr. 523, s. c. By the French law, La femme si elle est marchande publique, peut, sans l'autorisation de son mari, s'obliger pour ce qui concerne son negoce, et au dit cas elle oblige aussi son mari. Code Nap. L. 1, tit. 5, c. 6, 220.

Sale of goods to the wife.—Every married woman who resides with her husband, and has the general management of the household affairs, is presumed to be the general agent of the latter, in all matters connected with the domestic economy of the house and family. She is clothed with an implied authority from the husband to give orders for wearing apparel, furniture, provisions, and all such things as may fairly be presumed necessary for the decent maintenance of herself, her husband, and family, and the general comfort and enjoyment of the household, according to the apparent circumstances and situation in life of her husband, and the position in society which he allows her to assume.(x) "This rule is founded on common sense, for a wife would be of little use to her husband in their domestic arrangements, if she could not order such things as are proper for the use of a house, and for her own use, without the interference of her husband." (y) But the implied authority exists so long only as it has not been put an end to by the express prohibition of the husband. "It may be discharged as to any one particular man, by the prohibition and countermand of the husband; it would be a very hard case else, for she might make him liable to the greatest enemy he ever had in the world." (z) "If the husband have solemnly declared his dissent that she shall not be trusted, any person that has notice of this dissent trusts her afterwards at his peril; for the husband is only liable (during cohabitation) upon account of his own assent to the contracts of his wife, of which assent cohabitation causes a presumption; and when he has declared the contrary, there is no longer room for such a presumption." (a)

So long as the cohabitation continues, and the husband and wife reside together, the law concedes to the husband the right of determining how the wife is to be clothed, fed, and provided for. "This trust must be somewhere, the husband knows best how to manage affairs, and so is fitter to be trusted by the law than anybody else; and the law will not presume so much ill as that a husband should not provide for his wife's necessities." (b) But if the cohabitation ceases, if the wife is no longer sheltered under the roof of her husband, and she has been guilty of no misconduct entitling the husband to a divorce *a mensâ et thoro*, the law gives her a right, as we shall presently see, (post, 628—630,) to pledge the

(x) *Manby v. Scott*, 1 Lev. 4; 1 Sid. 109; 2 Smith's leadg. cas. 245, 249, a. c.

(y) Lord Abinger, *Emmett v. Norton*, 8 C. & P. 510. Lord Tenterden, *Clifford v. Laton*, 8 C. & P. 16.

(z) Hale, C. B., *Manby v. Scott*, 1 Sid. 109. Bridgman's Judgments by Bennett, 229, a. c.

(a) Per Holt, C. J., *Etherington v. Parrot*, 2 Raym. 1066.

(b) Hale, C. B., *Manby v. Scott*, 1 Bac. Abr. 717. "It shall not be left to a London jury to dress my wife in what apparel they think proper." Hale, C. B., 1 Sid. 122; 2 Smith's leadg. cas., 263, 264.

credit of her husband for all things necessary for her decent and comfortable maintenance, unless the husband has made her a competent allowance for her support, or she has separate property settled upon her sufficient for the purpose. And this liability on the part of the husband cannot be determined by general advertisements to tradesmen, or particular notices to individuals not to trust her. (c)

This implied authority, given by the husband to a wife who cohabits with him, and is placed at the head of his family, extends only to such orders for goods as the husband may reasonably be presumed to be aware of and to sanction. The husband concedes to the wife no implied authority to run into extravagance and to give orders which are far beyond his means, and such as no prudent housewife would think of giving, and no prudent and cautious husband would for a moment sanction. If the transaction is of such a nature that it is reasonably to be presumed that the husband would have disapproved of it had he known it, the ordinary presumption of an implied authority is rebutted, and the party dealing with the wife with the view of charging the husband under such circumstances, is a party to what is tantamount to a fraud upon the latter. If the keeper of a wine shop, for example, ministers to a married woman's passion for drink, he must rely upon her honour for payment, and cannot make his immoderate supply of wine the foundation of a demand against the husband. (d) If a tradesman, anxious to sell his wares, will minister to the follies and extravagances of a vain and silly woman, he must run the risk of his own imprudence and wickedness, and if it turns out that the husband was not aware of his wife's extravagance and did not sanction it, he cannot enforce payment from the latter.

To allow a wife to run into extravagance and waste the substance of the husband, without the knowledge and sanction of the latter, would lead to the most alarming and ruinous consequences. Weak and thoughtless women would be lured by avaricious and smooth-tongued dealers to their own destruction and the ruin of their husbands and families, and corrupt women would combine with unprincipled tradesmen to perpetrate the most iniquitous frauds. "The mercurer and the gallant would unite with the wife, and they would try their strength against the husband." (e) If a tradesman finds a wife giving extravagant orders, unsuited to the husband's estate and condition of life, he ought, if he intends to look to the

(c) *Boulton v. Prentice*, Selw. N. P. 279, 371.
280; 2 Str. 1214.

(d) *Spreadbury v. Chapman*, 8 C. & P. 122.

(e) *Hale, C. B., 2 Smith, 263, 264; 1 Sid.*

husband for payment, to ascertain whether the latter is aware of the wife's extravagance, and whether he does or does not sanction it.

A jeweller, in the course of eight weeks, supplied the wife of a special pleader, who had a separate income of 200*l.* a year under her marriage settlement, with jewellery, amounting to 83*l.*, and received from her 34*l.* on account, and never throughout the transaction saw any one but the wife, having always called at the house when the husband was absent at his chambers in the Temple, and there was no evidence to show that the husband knew of the delivery of the jewellery to the wife, or had seen her wearing it; and it was held that the husband was not responsible for the payment of it. (*f*)

A bonnet and dressmaker supplied a married lady with bonnets, feathers, lace, and various articles of millinery, the price of which, in the course of only a few months, amounted to the sum of 5,287*l.*, which the dressmaker sought to recover from the husband. The latter admitted his liability to the extent of 15*l.*, which he paid into court, and then pleaded "never indebted" to the residue of the claim, and it was held that he was not liable for one farthing beyond the 15*l.*, which was all that he could reasonably have been considered to have authorized. "The tradesman," observes Parke, B., "ought to be careful not to supply the wife to an extravagant extent; for her giving orders to such an extent would go to show she was not then acting as the husband's agent, and to the extent authorized by him. If he had any doubts upon the subject, he might have made inquiries of the husband. It was not proved that the husband *knew* the articles had been ordered or saw his wife wearing them." (*g*)

If a married lady goes to a watering-place without her husband, and orders expensive articles of dress unsuitable to her husband's circumstances, and the latter disapproves of her extravagance as soon as he is made acquainted with it, he is not responsible for the price of the things supplied to her. (*h*) And if, during the temporary absence of the husband from home, the wife lives notoriously in a style of expense beyond what the husband's means will justify, tradesmen must be cautious of trusting her for anything beyond the mere necessities of life. If they indulge her taste for superfluities and luxuries without the sanction of the husband, they run the risk of his repudiation of her debts and expenses. (*i*)

(*f*) *Montague v. Baron*, 5 D. & R. 536; 3 Bing. 23, s. c.
 . & C. 631, s. c. (*h*) *Atkins v. Curwood*, 7 C. & P. 756.
 (*g*) *Lane v. Ironmonger*, 13 M. & W. 369, (*i*) *Dennys v. Sargeant*, 6 C. & P. 419.
 370. *Seaton v. Benedict*, 2 M. & P. 66; 5

Loans of money to the wife.—Persons ought also to be cautious how they lend their money to a married woman, for she has in general no implied authority to borrow money and charge the husband with the repayment of it. Such small amounts as a wife might require upon an emergency for her household expenses, medicines, or necessaries, a third party would be justified in lending her, and might recover the amount of the loan from the husband ; (*k*) but for any considerable sum of money lent to a married woman, without the knowledge and sanction of the husband, the lender has no other security than the honour of the wife, unless he can show that the money has come to the use of the husband. (*l*) And whenever money advanced to the wife is sought to be recovered in action against the husband, it must be declared for as money lent to the husband himself at his request, or as lent to the wife at the request of the husband. (*m*) If the declaration alleges that money was lent to the wife at her *own* request, it discloses no cause of action against the husband. (*n*)

Subsequent sanction and adoption by the husband of the wife's contracts.—"If the wife purchase goods, and the husband, by any act, precedent or subsequent, ratifies the contract by his assent, the husband shall be liable upon it, whether the goods are for himself, or for his children, or for his family." (*o*) If the things, although they have not come to the hands of the husband, or to his use, are known by him to have been ordered by the wife, and the husband has made no objection to her use and enjoyment of them, or given the parties who supply her any intimation of his disapproval, he will be deemed to have adopted and sanctioned the wife's expenditure, unless it appears that she has a separate income at her own disposal, to be expended by her free from the control of the husband. It is the duty of the husband, when he sees his wife indulging immoderately in dresses and ornaments and expensive tastes, and knows that she has no separate income of her own to spend in luxuries and superfluities, to give notice to the tradesmen who supply her that he does not sanction her extravagance, and does not intend to pay for the things ordered by her. If he chooses to lie by and permit her to continue her extravagance, giving no warning to those who bring the goods to his house, he will be presumed to have given a subsequent sanction and ratification of her acts, which is equivalent in all cases to a

(*k*) *Harris v. Lee*, 1 P. Wms. 482.

(*l*) *Earle v. Peale*, 1 Salk. 387.

(*m*) *Stephenson v. Hardy*, 3 Wils. 388; 1 W. Bl. 872, s. c.

(*n*) *Stone v. Macnair*, 1 Moore, 126; 7 Taunt. 482; 4 Pr. 48, s. c.

(*o*) By all the judges, *Manby v. Scott*, 2 Smith's Leading Cases, 261.

precedent authority. "If he has any control over goods improvidently ordered by the wife, so as to have it in his power to return them to the vendor, and he does not return them or cause them to be returned, he adopts her act, and renders himself answerable." (p) Thus, where a tradesman supplied a married lady with silver fringes for side saddles, and lace for petticoats, of the value of 94*l.*, and it appeared that the husband and wife were living together, and that the laces and silver fringes had been worn and used by the wife in the presence of the husband, without any objection having been made by him to her use of them, it was held that the husband was responsible for the payment of the price of the things so furnished to the wife. (g)

The mere circumstance, however, of the husband's seeing the wife wearing some of the things ordered by her, and not objecting to her use of them, will not amount to a recognition of the whole of an extravagant order; and the husband may, therefore, by tendering a sum of money sufficient to cover what he can fairly be presumed to have known of and sanctioned, escape from liability in respect of the residue of the demand. (r) And if, by the wife's marriage settlement, or the bounty of her friends, a separate income has been settled upon her, to be received and expended by her free from the control of her husband, the mere circumstance of the husband being aware of the wife's possession and use of the things, will not fix him with a subsequent adoption and ratification of the wife's contract, unless it be clearly shown that she was persevering in a course of extravagance far beyond the separate means at her own disposal, and, knowing this, that he made no attempts to check her extravagance, and gave no warning to the parties who, he must have known, were ministering to her follies.

If, however, a tradesman deals exclusively with the wife in matters of female luxury and dress, in ornaments, jewellery, and trinkets, if he never sees the husband, or has any communication with him respecting the supply of the articles to the wife, it will be left as a question for the jury to determine, whether the goods were not supplied on the credit of the wife, and under the expectation that she would be the paymaster, and not on the credit of the husband, and with the intention of looking to him for the price of them. It is difficult at first sight to see how any credit can be recognised by the law as having been given to a married woman who can incur no liability *ex contractu*, and who is (theoretically) under the

(p) Lord Ellenborough, *Waithman v. Wakefield*, 1 Campb. 122.

(g) *Martin v. Withers*, Skin. 348.

(r) *Lane v. Ironmonger*, 13 M. & W. 369, 370.

absolute control and government of the husband ; but as in modern times, marriage settlements have been brought extensively into use amongst all the monied classes of society, and married women are permitted, through the medium of trustees holding property for their use, to have possession of pocket money, pin money, and quarterly allowances, and are notoriously in the possession of funds of which they have the exclusive control, which are expended by them separate and apart from the husband and free from his interference, it is left to juries to say whether the things furnished to a wife were not furnished to her on the credit of the funds of which she was actually or presumptively possessed, and whether the tradesman did not deal with her on her own account upon the expectation that she would be the paymaster, relying upon her honour and good faith to apply whatever separate means she might have at her disposal in liquidation of her debts.

Thus, where a married woman, having separate property of her own, has directed accounts to be made out in her name, and has been in the habit of paying them out of her own separate monies, or has drawn and accepted bills of exchange and made promissory notes by way of payment for the things supplied to her, and has honoured such bills and notes when they became due, it has been held that the parties who have so dealt with her, and treated her as a *feme sole*, have given credit to her and not to her husband.

A milliner supplied articles of dress to the amount of 200*l.* during an interval of six months, to the wife of an apothecary in a country village, and took a promissory note made by the wife in her own name for payment of the 200*l.* The husband might have seen some of the dresses worn by the wife, but there was no evidence to show that he was at all aware of the extent of her dealings with the plaintiff. A former debt of the same sort, that the wife had contracted with the plaintiff without the husband's knowledge, had been paid by the wife's father, who then requested the plaintiff to give no further credit to the wife without the sanction of the husband, and it was held by Lord Ellenborough, that the husband could not be made liable in any shape, on the plain ground that the goods were not supplied on the husband's credit, and that the plaintiff had by her course of dealing showed that she had looked only to the wife for payment.(s)

On the trial of an action against a husband for the price of millinery furnished to his wife, it appeared that the plaintiffs, who were dressmakers,

(s) *Metcalfe v. Shaw*, 3 Campb. 22.

had, in the course of a year and a half, supplied the wife with fashionable dresses to the amount of 183*l.*; that the husband was an attorney in moderate practice, residing with his wife, and that he had seen her wearing some of the articles. It further appeared that the plaintiffs had drawn bills of exchange on the husband by name on account of some of the goods so supplied, which bills were presented to and accepted by the wife, and paid by her when they became due, that these bills had never been presented to the husband or brought to his notice, and that he was not in anyway aware of the nature of the dealings between his wife and the plaintiff's. It further appeared that when some of the articles were sent home, the wife had directed her servant to put them away that her husband might not see them;—that the wife was debited in the plaintiff's books;—and that in the presence of the husband, and one of the plaintiffs, she had said that her husband never paid her bills, but that she always paid them herself, and the judge accordingly told the jury that this was strong evidence to show that the plaintiffs gave credit to the wife and not to the husband. The jury, however, found a verdict for the plaintiff, and a new trial was moved for by the husband, and granted by the court, on the ground that "the verdict was grossly wrong; that the credit was given to the wife; and that the husband was liable for no part of the charges."*(t)*

A jeweller supplied the wife of the defendant, who was a merchant's clerk, with jewellery to a large amount, and sent in his bill to the husband's residence headed "*Mrs. Brittan.*" It further appeared that at the time of the purchase of the articles, Mrs. Brittan stated that she bought them for a friend in the West Indies, who would send the money for them as received, and that the defendant said "That will do very well." There was no evidence to show that the jewellery had ever come to the use of the husband, and it was held by Garrow, B., that the jeweller had given credit to the wife and the remittances she was to receive from the West Indies, and not to her husband, and that an action against him for the price of the jewellery could not be maintained.*(u)*

In an action against a husband for a debt of 757*l.* 0*s.* 6*d.*, incurred by his wife, it appeared that the plaintiff, who was a dealer in foreign fancy birds, had, in the course of ten months, supplied the wife with fancy birds to the amount of 959*l.* 18*s.* 6*d.*, that he had received from the wife 202*l.* 18*s.* on account, and was suing the husband for the residue. It was proved that the husband was a clergyman residing with his wife at a rectory house in the country, in which he had caused a room to be fitted up as an aviary;

(t) *Bentley v. Griffin*, 5 Taunt. 356.

(u) *Taylor v. Brittan*, 1 C. & P. 16, n. *Leggat v. Reed*, *ib.*

that between six and seven hundred birds, consisting of love birds, bishop birds, lories, avadavats, cardinals, out-throats, quakers, manakins, &c., &c., had been furnished by the plaintiff to the wife pursuant to her orders and placed in this aviary, that the husband had seen them there, and that a few months afterwards he had ordered them to be sold, and that two hundred of them were sold for the sum of 110*l.*, and part of the purchase money received by him. There was no evidence to show that the husband was at all aware of the extravagant extent to which the wife had gone in her orders, or that she was incurring a debt to anything like 959*l.* in respect of the birds at the time they were sent in. It further appeared that the wife had an income of 800*l.* a year secured to her separate use by her marriage settlement; that she kept a separate banking account of her own at Messrs. Drummonds, had her own pass books, and drew checks on the bankers in her own name, which were paid out of her separate funds in their hands. It was further shown that all the accounts and invoices made out in respect of the birds by the plaintiff, were headed "Mrs. Dr. Butcher;" that the plaintiff had drawn bills of exchange on Mrs. Butcher at different times in part payment of the price of the birds, which had been accepted by her in her own name, and paid at her bankers; and that the plaintiff had sent all the accounts and invoices to her, and not to her husband, and Lord Abinger told the jury that no man living could doubt but that the dealing was on the credit of the wife, and that the husband was not responsible, and a verdict was accordingly found for the husband the defendant. "Here you have a married woman," observes his Lordship, "ordering in about ten months more than 900*l.* worth of fancy birds. If the thing is out of the ordinary course, juries ought to insist on strict proof." (x)

If the tradesman at the time he deals with and trusts the wife does not know her to be a married woman, he cannot be said to have given credit to the husband, or to have sold his wares upon the expectation that the latter would be the paymaster, and if articles sold to the wife under such circumstances have not been consumed in the husband's household, or have come in any shape or way to his use, he cannot be made responsible for the payment of the price of them. "If a shopkeeper will sell goods to every one who comes into his shop without inquiring into their circumstances, he takes his chance of getting paid; and it lies on him to make out by full proof his claim against any other person." (y) Every case of

(x) *Frestons v. Butcher*, 9 C. & P. 648.

(y) *Ld. Tenterden, C. J. Clifford v. Leion*, 1 Mood. & Malk. 102, 103.

this description must depend upon its own particular circumstances, so that substantial justice may be meted out to the parties ;—that the husband on the one hand may not be oppressed and ruined by the fraudulent and dishonest attempts of grasping and avaricious tradesmen, whose anxiety to sell leads them to pander to the weaknesses of vain and thoughtless women, and that an unprincipled husband may not on the other hand make his wife an instrument of fraud upon the honest and upright dealer.

Proof of the marriage.—If parties have lived together as man and wife, and are commonly reputed to be married, this is sufficient quoad third parties to charge them with the duties and responsibilities that result from such a status and relationship,^(x) and if it be proved that they have actually gone through the marriage ceremony, but that they afterwards separated, there is sufficient evidence of their standing towards each other in the relationship of man and wife, unless a divorce can be proved. The husband cannot plead that the marriage was illegal, as the determination of such a question belongs more properly to the spiritual court than to the courts of common law.^(a)

LIABILITY of the HUSBAND in respect of the wife's debts and engagements after SEPARATION or DIVORCE. (Ante, 841, 842.)

Separation by mutual consent.—The husband and wife cannot by any contract or agreement between themselves dissolve the marriage tie, or in anywise change their legal capacities or characters.^(b) The wife, indeed, as we have already seen, has no power of contracting at all on her own account during the continuance of the marriage, and it is obvious that the husband and wife, being one person in the eye of the law, cannot contract with one another.^(c) When, therefore, by reason of matrimonial differences the husband and wife wish to live separate, upon the terms that the wife shall be allowed an annuity for her maintenance, and the husband be discharged from all liability in respect of the debts she may incur, it is necessary that a trustee should be appointed to contract with the husband for the purpose of carrying those objects into effect. It has been said that such contracts are contrary to the policy of the law, as tending to loosen the marriage tie, and ought not to be enforced ; but numerous decisions have established their validity, so far as they relate to the securing an allow-

(x) *Mace v. Cammel*, Lofft, 782. *Edwards v. Farbrother*, 2 M. & P. 298 ; 3 C. & P. 524 a. c.

(a) *Norwood v. Stevenson*, Andr. 227.

(b) *Marshall v. Rutton*, 8 T. R. 545. Lord

St. John v. Lady St. John, 11 Ves. 530. *Esers v. Hutton*, 3 Esp. 254.

(c) Litt. sec. 168. *Legard v. Johnson*, 3 Ves. 858. *Garth v. Earnshaw*, 3 Y. & C. 584.

ance to the wife to be paid by the husband to a trustee for her use, and to the indemnification of the husband by the latter against all further liability in respect of the wife's debts and engagements during the continuance of the separation; and, therefore, if the husband and wife separate, and the husband covenants with a trustee appointed by the wife or her friends to pay an annuity for the wife's maintenance, and the trustee covenants with the husband to indemnify him against the wife's debts, these mutual covenants may be enforced by an action at law.

But a deed purporting to be a deed of separation between husband and wife, and containing a covenant by the husband with a trustee, acting on behalf of the wife, not to cohabit with her, but to permit her to live separate and apart from him, and have the entire conduct and control of her own actions, is nugatory and of no effect, unless it is founded on such misconduct on the part of the husband as amounts in the judgment of the ecclesiastical court to a forfeiture of his marital rights, and entitles the wife to a decree for a divorce *a mensâ et thoro*. "The obligations of the marriage contract are not to be relaxed at the pleasure of one party or at the pleasure of both. For if two persons have pledged themselves at the altar of God to spend their lives together for purposes that reach much beyond themselves, it is a doctrine to which the morality of the law gives no countenance, that they may by private contract dissolve the bands of this solemn tie, and throw themselves upon society in the undefined and dangerous characters of a wife without a husband and a husband without a wife." (d) They cannot by any contract, however formally made, prevent either of them from insisting on the restitution and enjoyment of conjugal rights. If the husband covenants in the most solemn way that can be conceived with trustees for the wife never to compel her to cohabit and reside with him, and never to institute a suit in the ecclesiastical court for the restitution of conjugal rights, such a covenant does not prevent him from instituting the suit, and obtaining a decree ordering the wife to return and cohabit with him.

"Deeds of separation are not pleadable in the Ecclesiastical Court as a bar to its proceedings, for the court considers a private separation as an illegal contract, implying a renunciation of stipulated duties—a dereliction of those mutual offices which the parties are not at liberty to desert—an assumption of false character in both parties contrary to the real *status personæ*, and to the obligations which both of them have contracted in the sight of God and man, to live together 'till death them do part,

(d) Sir William Scott, *Evans v. Evans*, 1 Hag. Consist. 118.

and on which the solemnities both of civil society and of religion have stamped a binding authority, from which the parties cannot release themselves by any private act of their own, or for causes which the law itself has not pronounced to be sufficient and sufficiently proved." (e)
 "A man may pledge himself not to claim or institute a suit for conjugal rights; but he cannot be bound by any such pledge, for it is against the inherent condition of the married state as well as against public policy." (f)

But if a husband who has executed a deed, purporting to be a deed of separation between him and his wife, institutes proceedings in the ecclesiastical court for the purpose of compelling his wife to return and cohabit with him, the deed may be pleaded as a fact in the case explanatory of the conduct of the husband; and if it appears upon the face of the instrument, by the husband's own acknowledgment, that the separation has been occasioned by cruelty towards the wife, or such misconduct on his part as produces a forfeiture of his marital rights, and entitles the wife to a separation from bed and board, the court will not, of course, order her to return to him, (g) not by reason of the contract, but of the husband's misconduct, of which the deed itself may be cogent and irresistible evidence.

When the husband has forfeited his marital rights by adultery or cruelty to the wife, and has entitled the latter to a divorce *a mensâ et thoro*, there is no legal objection to a private arrangement between the parties to obviate the necessity of a public exposure of their domestic afflictions, and of the husband's disgrace in a court of justice, (h) and the husband may therefore, under the pressure of such misconduct, give security to the wife's friends for the observance of that line of conduct towards her, which she has a right by law to exact from him, and which the ecclesiastical court, if appealed to by the wife, would compel him to adopt. And, therefore, if the husband, to prevent the public scandal and disgrace of a suit for a separation from bed and board, consents privately to such a separation, and covenants with a trustee acting on behalf of the wife to permit her to live in peace and quietness away from him, and not to compel her to cohabit with him, such a covenant, made under such circumstances, is not contrary to public policy, and is not consequently

(e) Sir Wm. Scott, *Mortimer v. Mortimer*, 2 Hag. Consist. R. 318. *Sullivan v. Sullivan*, 2 Addams, 303.

(f) Lord Brougham, *Warrender v. Warrender*, 2 Cl. & Fin. 561; 2 Hag. Eccles. R. Suppl. 44, n. *Westmeath v. Westmeath*, 2 Hag.

Eccles. Suppl. 115.

(g) *Mortimer v. Mortimer*, 2 Hag. Con. 319. *Westmeath v. Westmeath*, 2 Hag. Eccles. Suppl. 115.

(h) *Soilleux v. Herbst*, 2 B. & P. 444.

void. It may be enforced through the medium of a bill in equity for a specific performance of it (i) as well as through the medium of an action at law.

A husband sought to obtain possession of the person of his wife through the medium of a *habeas corpus*, and the return to the writ stated that the husband, having used the wife very ill, the latter desired a separation, and that the husband, in consideration of a great sum which the wife gave him out of her separate estate, consented to her living alone, and covenanted under a large penalty "never to disturb her or any person with whom she should live," that the wife then went to live with her mother, and was residing with her at her own anxious desire, and that the writ had been sued out by the husband with a view of seizing the wife by force, and the court held that the contract made by the husband under such circumstances amounted to a formal renunciation by him of his marital rights over the person of his wife; that he had no right to seize her, or force her back to live with him, and they dismissed the wife with an assurance that she was at free liberty to go home and live where, and with whom she pleased, and that her husband had no coercive power at all over her. (k)

But so long as there has been no such misconduct on the husband's part, as amounts to a forfeiture of his marital rights, a covenant to discontinue cohabitation would be nugatory and of no effect. The ecclesiastical courts will pay no attention to it; the courts of equity will not enforce it, (l) and no proceeding could be maintained against the husband for a breach of it in any court of common law. (m)

But whatever may be the circumstances under which a separation takes place, a deed, so far as it is made to provide alimony or a competent maintenance to the wife during the continuance of the separation, and to protect the husband from the wife's debts, will be recognized as valid, and the mutual covenants for the attainment of those objects may be enforced either by a bill in equity for a specific performance of them, (n) or through the medium of an action at law. The husband, being by law bound to support and maintain his wife, may covenant with any third party to pay a sum of money for her separate use, either for a term of years or during her natural life, provided the covenant is absolute

(i) *Angier v. Angier*, Gilb. Eq. Cas. 153; Pre. Ch. 499, s. c.

(k) *Rex v. Read*, 1 Barr. 542; 2 Ken. 279.

(l) *Wilkes v. Wilkes*, 2 Dick. 791; 11 Ves. 530. *Legard v. Johnson*, 3 Ves. 352. *Durand v. Durand*, 2 Cox, 207. *Worrall v. Jacob*, 3

Mer. 268.

(m) *Rex v. Lord Fane*, 1 W. Bl. 18.

(n) *Ros v. Willoughby*, 10 Pr. 2. *Logan v. Birket*, 1 Myne & E. 225. *Elworthy v. Bird*, 2 Sim. & Stu. 281. *Turner v. Boteler*, Finch, 73.

and unqualified, and the performance of it is not made to depend upon the contingency of a future separation, or made conditional upon the wife's consent to live separate. (o) If the covenant is entered into as an inducement to either the husband or the wife to separate, it is absolutely void as offering a direct premium for the breach of the marriage vow. And, therefore, if it appears by a deed, entered into between the husband and the wife's trustee, that the separation is not a present, immediate, and actually accomplished separation, but is subsequently to be carried into effect, the covenants between the husband and the trustee for the payment of money to the wife, and for the indemnification of the husband from the wife's debts, will be void as being contrary to the public policy of the law.

Thus, where a deed recited that various differences and animosities existed between the husband and wife—that they had nearly led to a separation, but that the parties, by the intervention of their mutual friends, had consented to live together, upon condition that if at any future period those differences and disputes should again revive in the manner expressed in the deed, they should separate; and the deed then contained mutual covenants on the part of the husband, and a trustee appointed by the wife and her friends for the provision of a separate maintenance for the wife by the husband, and for the protection of the husband against the wife's debts, in case of the renewal of such differences and disputes, and consequent separation, it was held that the deed was void as being contrary to public policy. (p) So, "when parties execute a deed by which they agree to separate from each other, but at the same time it is stipulated between them verbally that they shall continue to live together, and they do in fact continue to live together after that deed has been executed, residing in the same house, although they may not cohabit together as husband and wife, such a deed cannot, under such circumstances, in point of law, be sustained," (q) and the husband cannot subsequently be sued upon any covenant therein contained for the provision of a separate maintenance for the wife.

A covenant by the trustee to indemnify the husband against debts and expenses contracted by him and his wife, during the time they were cohabiting and living together, as well as against debts that may subsequently be contracted by her, is not, in contemplation of law, a covenant

(o) *Clough v. Lambert*, 10 Sim. 178. *Bostock v. Hume*, 7 M. & Gr. 893. *Duffield v. Scott*, 3 T. R. 376.

(p) *Westmeath v. Salisbury*, 5 Bl. N. S. 398.

Durant v. Tiley, 7 Pr. 577.

(q) The Ld. Chancellor, ib. 395. *Hindley v. Westmeath*, 6 B. & C. 200.

or engagement to pay money as an inducement for a separation, and is not consequently void. (r)

If the husband and wife separate, and the husband covenants generally with a trustee to pay an annuity to the wife, the covenant is avoided, and the husband's liability thereon is discharged, by a subsequent reconciliation and cohabitation between the parties. (s) But if the annuity is covenanted to be paid to her during the term of her life, and it is provided that a subsequent cohabitation shall in no wise alter or affect the husband's liability upon the covenant, the wife's right to the annuity will not be affected by her consenting to live with her husband again. (t)

If the covenant is a covenant to pay the annuity during the continuance of a separation by mutual consent, and the husband has not forfeited his marital rights by his own misconduct, he may discharge himself from his liability thereon by offering to receive back the wife, and requiring her to cohabit with him; (u) but if he covenants absolutely and unconditionally with the trustee to pay the annuity during the life of the wife, an offer to continue the cohabitation (x) is no answer to an action upon the covenant. But the husband, if he desires, and has a right to require a continuance of the cohabitation, must resort to the ecclesiastical court and obtain a decree ordering her to return. And when the husband and wife have separated, and the husband has entered into such a covenant with a trustee on her behalf, his liability to pay the annuity is not discharged either by the subsequent commission of adultery by the wife, (y) or by a decree of divorce *a mensâ et thoro* pronounced by the ecclesiastical court in consequence of such adultery. "If the husband wished to make the commission of adultery a condition of paying the annuity to his wife, he should have covenanted to pay it *quamdiu casta vixerit*." (z)

When a separation has taken place, and property has been settled upon the wife and children of the marriage, for their support, the settlement will be upheld against the future creditors of the husband, (a) unless it appears that the separation was illusory and without adequate cause.

DIVORCE *a mensâ et thoro*.—"The distinction between divorce from

(r) *Jones v. Waite*, 7 Sc. 328, 330; 5 Sc. N. B. 951, s. c. *Summers v. Ball*, 8 M. & W., 596.

(s) *Ld. St. John v. Lady St. John*, V. 537. *Bateman v. Ross*, 1 Dow. 245. *Scho v. Goodman*, 1 C. & P. 39.

(t) *Wilson v. Mushett*, 3 B. & Ad. 751.

(u) *Whorewood v. Whorewood*, Ch. C. 250. Finch, 153, s. c.

(x) *Seeling v. Crawley*, 2 Vern. 386.

(y) *Baynon v. Batley*, 1 M. & Sc. 339; 8 Bing. 256, s. c.

(z) *Abbott, J. C., Jee v. Thurlow*, 2 B. & C. 551; 4 D. & R. 11. *Seagrave v. Seagrave*, 13 Ves. 439.

(a) *Hobbs v. Hull*, 1 Cox, 445. *Nunn v. Vismore*, 8 T. R. 529. *Stephens v. Olive*, 2 Br. C. C. 90.

bed and board, and from the bond of matrimony, is not mentioned in scripture, and was unknown to the ancient church. It was devised by the canonists and schoolmen, and first established by the decrees of the Council of Trent." (b) Cruelty on the part of either the husband or the wife is a sufficient ground for a divorce a mensâ et thoro. If a husband refuses his wife the common necessities of life, or treats her with gross insult and indignity—if he spits in her face, attempts to debauch her maid servants, (c), or puts her unnecessarily into confinement, or under personal restraint; or strikes her, or threatens her with personal violence unjustifiably and without adequate provocation, (d) and conducts himself so as to give her a reasonable apprehension of bodily harm, if she continues to reside with him, he is guilty of cruelty, and entitles her to separation from bed and board." (e) Everything is, in legal construction, cruelty, which tends to bodily harm, and in that manner renders cohabitation unsafe; whenever there is a tendency only to bodily mischief, it is a peril from which the wife must be protected. It is not necessary to inquire from what motive the treatment proceeds. (f) It may be from turbulent passion, or sometimes from causes not inconsistent with affection. If bitter waters are flowing it is not necessary to inquire from what source they spring. If the passions of the husband are so much out of his own control, as that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocation such violence originated. The court has an indisposition to interfere on account of one act, particularly between persons who have been under long cohabitation, because it may be hoped and presumed that it will not be repeated. But if one act should be of that description which should induce the court to think that it is likely to occur again, and to occur with real suffering, there is no rule that should restrain it from considering that to be fully sufficient to authorize its interference. Nor is it necessary that the conduct of the wife should be entirely without blame, for the imputation of blame to the wife will not justify the ferocity of the husband." (g) But there must be a reasonable and well-founded apprehension of personal injury. "Mere turbulence of temper, petulance of manners, infirmity of body or mind, are not sufficient. When they occur, their effects are to be subdued by management, if possible, or submitted to with patience, for the engagement is "to take

(b) *Shelford on Marriage and Divorce*, 365.

(c) 1 Hag. Eccles. 776; *Hetley*, 149.

(d) *Waring v. Waring*, 2 Phill. 132, 133.

(e) *Gregory's case*, 4 Burr. 1991.

(f) But if a wife resists sexual intercourse she has no ground to complain of accidental injuries she received in the struggle.

(g) Sir Wm. Scott, 1 Hag. Consist. 458.

for better, for worse," and painful as the performance of this duty may be, painful as it certainly is in many instances, which exhibit a great deal of the misery that clouds human life, it must be attempted to be sweetened by the consciousness of its being a duty."

The assistance of the court will not be afforded to a wife "who has taken upon herself to avenge her own wrongs, and to maintain a contest of retaliation." (k)

A DIVORCE *a mensâ et thoro* does not dissolve the marriage tie, or invest the wife with any of the attributes of a feme sole; it does not enable her to contract, so as to render herself responsible, or effect any alteration in her civil rights and responsibilities, except to justify her in living separate from her husband, and entitle her to alimony and a separate maintenance upon the terms of the decree. (i)

LIABILITY of the HUSBAND upon the wife's contracts after SEPARATION or DIVORCE *a mensâ et thoro*.

Separation by reason of the adultery of the wife.—The husband, by the marriage contract, takes upon himself the duty of supporting and maintaining his wife so long only as she remains faithful to her marriage vow "to forsake all others and keep only unto him. Wanton women who violate their marriage vow, have no longer any claim on the husband (unless he has previously settled property upon them to their separate use, or has entered into a special contract with a trustee to pay them an annuity.) Such women are to be fed with the bread of affliction and satisfied with the waters of adversity." If the husband detects the wife in the commission of adultery, he may forthwith put her away from him, and refuse any longer to maintain her, and third parties who furnish the wife with the means of subsistence after a separation on such a ground, have no claim against the husband in respect thereof, whether they have notice of the adultery or not, at the time they furnished their goods, or whether they had or had not received an express prohibition from the husband directing them not to supply the wife." (k)

The previous adultery and misconduct of the husband form no excuse in point of law for the adultery of the wife.—Thus, where a husband having committed adultery with a woman whom he had brought to his house, quarrelled with his wife, treated her with great cruelty, and at last turned

(A) Sir Wm. Scott. 1 Hag. Conist. 119, 364, 365.

(i) *Clayton v. Adams*, 6 T. R. 605.

(k) Co. Litt. 32 b. *Morris v. Martin*, 1 Str.

647. *Mainwaring v. Sands*, 2 ib. 706. *Child v. Hardgman*, ib. 874. *Hardie v. Grant*, 8 C. & P. 512. *Cragy v. Bowman*, 6 Mod. 147.

her out into the street. The wife then went and committed adultery, but subsequently repenting of her conduct, and having no means of subsistence, she offered to return to her husband, but the latter would not receive her, whereupon the wife obtained board and lodging from a third party, who sought to charge the husband with the payment of it, on the ground that the previous adultery of the latter precluded him from taking advantage of his wife's misconduct; but the court held that it made no difference in the case, and that the action was not maintainable. (l) But if a condonation takes place; if the husband after he has put her away by reason of adultery, receives her back again, all her original rights are restored, and the husband cannot then refuse to support and maintain her, unless he can prove the commission of a fresh and subsequent act of adultery. (m) And if the husband connives at the adultery of the wife, he cannot refuse to maintain her. If he permits her to remain in the possession of his dwelling-house, "and voluntarily yields his bed to the adulterer, he has no colour of defence. Knowing of her criminal conduct and conniving at it, he must maintain her as before." (n)

Proof of the adultery.—The commission of the adultery must be strictly proved by the husband who seeks to resist the claim for necessities, and the verdict in an action for criminal conversation being *res inter alios acta*, cannot be adduced as evidence of the adultery in an action between the husband and the person who has furnished the means of subsistence, unless he was himself the defendant in that action. (o)

Desertion of the husband by the wife.—If the wife leaves the husband without just cause, and refuses to cohabit with him, she forfeits her right to maintenance. If she will not share his bed and board, she cannot procure subsistence elsewhere, at his expense. To permit tradesmen to supply goods and the means of subsistence to wives who have deserted their husbands and families, and to charge the husband with the payment of the price of the articles so supplied, would be the means of affording a direct premium for the breach of the marriage contract, and the commission of all sorts of crimes, and would be clearly contrary to the public policy of the law. Therefore, "it has been resolved that if the wife will not cohabit with the husband, but during the time of her voluntary departure, purchases provisions and clothes for herself, and it is given in evidence to the jury that they were necessities suited to the estate and degree of her husband, yet this is not sufficient evidence to warrant a finding

(l) *Govier v. Hancock*, 6 T. R. 808.

(m) *Harris v. Morris*, 4 Esp. 41.

(n) *Buller, J. Norton v. Fazan*, 1 B. & P.

227. *Robison v. Gornold*, 6 Mod. 172; 1 Salk, 119, s. c.

(o) *Hardie v. Grant*, 8 C. & P. 514.

by the jury in assumpsit against the husband, for there is a difference for this purpose between wives who are willing to cohabit with their husbands, and those that spontaneously depart from them; and this appears by *Magna Charta*." (o)

"If a woman, who can have no goods of her own to live on, will depart from her husband against his will, and will not submit herself to him, let her live on charity or starve in the name of God, for in such case the law says, her evil demeanour has brought it upon herself, and her death ought to be imputed to her own wilfulness. . . . If she be of so haughty a stomach that she will choose to starve rather than submit, and be reconciled to her husband, let her take her own choice. The law is in no default which doth not provide for such a wife." (p)

Wife's offer to return.—If the wife has departed from the husband and lived separate from him without just cause, and then offers to return to him, his liability to receive her back and maintain her will depend upon the length of the separation and the wife's conduct during the intermediate period. If she has retired to the bosom of her own family, and lived a virtuous and moral life, and has returned to a sense of duty after a short absence, the husband would be bound to receive her back; and if he refused to do so, his liability for necessities supplied to her would be revived from the time of such refusal. (q) But if she persists in her neglect of the marriage tie and of her duties as a wife for a lengthened period, and refuses the solicitations of her husband to return to him, the latter would not, after such a continued course of disobedience and misconduct evidencing her incapacity properly to fulfil the duties of a wife, be bound to receive her back or maintain her. "When she departs from her husband against his will, and remains so long absent, and returns again at her own pleasure, the husband shall not be obliged to maintain her after her return any more than when she was absent; for if it were so, wives might leave their husbands in their youth, and return in their old age when they cannot be so assisting to their husbands as before; and their society and assistance and comfort to their husbands is one consideration for their maintenance." (r) "The wife, moreover," observes Hyde, J., "ought to be a penitentiary before the husband is bound to receive her back or give her any maintenance. By departing from her

(o) *Manby v. Scott*, 2 Smith's cas. 272; 1 Sid. 129, 130.

(p) Hyde, J., *Manby v. Scott*, 12 Mod. 132. So by the civil law, Si uxor propria sine culpa mariti sit extra consortium viri, non tenetur maritus extunc ei extra consortium suum exis-

tenti aliquoliter subministrare. Dig. lib. 23, tit. 3.

(q) Raym., C. J., 2 Str. 875. Tyrrell, J., 12 Mod. 131. Lord Eldon, *Evers v. Hudson*, 3 Esp. 256.

(r) *Manby v. Scott*, 1 Lev. 5; 12 Mod. 131.

husband against his will, she breaks her marriage vow, deprives him of that mutual society, help, and comfort which she owes him for divers years, and are all these offences washed away with a bare desire without submission or contrition? Certainly they are not; confession and promise of future obedience ought to precede her restitution to the privileges of a wife." (s)

The liability of the husband, therefore, for necessities supplied to a wife who is living separate and apart from him depends upon the circumstances attendant upon the separation, and tradesmen must be cautious in trusting such wives without the knowledge and sanction of their husbands, or without making strict inquiries into the cause of the separation. If they do part with their goods, and then seek to charge the husband with the payment of them, the onus of proving that the separation took place under such circumstances as will entitle them to recover the price from the latter falls upon their shoulders. (t) "The mischief of allowing the ordering of goods by a married woman living apart from her husband, to be *prima facie* evidence, so as to charge him for them, would be incalculable." (u)

Desertion of the wife by the husband.—So long as the husband and wife cohabit and reside together, the husband's duty of supporting and cherishing his wife is presumed to be fulfilled, and the law leaves it to the husband, as we have already seen, to determine in what style and degree she is to be maintained, so that no third person has any right to supply the wife with necessities or with goods of any description in the face of an express prohibition from the husband. But if the husband separates himself from his wife, or removes her from his dwelling, and leaves her destitute, without being able to prove that she has forfeited her marriage rights by adultery, the prohibition is of no avail, for the law then gives her a right to support herself upon the credit and at the expense of her husband, and any tradesman who at her request supplies her with necessities suitable to her degree and station in life, does, in contemplation of law, supply them to the husband himself, and may recover the amount as a debt due to him from the latter, notwithstanding the prohibition. "That cannot avail him, for if he put the wife out of doors, though he advertised and cautioned all persons not to trust her, or if he even gave particular notice to individuals not to give her credit, still he would be liable for necessities furnished her; for the law has said, that

(s) *Manby v. Scott*, 12 Mod. 132.

(t) *Clifford v. Laton*, 3 C. & P. 16. *Waithman v. Wakfield*, 1 Campb. 121. *Edward v.*

Towels, 6 Sc. N. R. 641.

(u) *Abbott, C. J., Mainwaring v. Leslie*, 1 Mood. & Malk. 18.

where a man turns his wife out of doors, he sends with her credit for her reasonable expenses." (x) And if a married woman has been forcibly expelled from her home by her husband, and threatened with violence at his hands, "she carries along with her a credit for whatever her preservation may require. She has a right to appeal to the law for protection, so as to charge her husband for the necessary expense of the proceeding, as much as for necessary food or raiment." Therefore, where a wife, being turned out of doors with circumstances of great violence by her husband, employed an attorney to exhibit articles of the peace against him, it was held that the husband was responsible for the payment of the attorney's charges. (y) But an indictment against the husband is not necessary for the protection of the wife, and, therefore, where a husband, having ill-treated his wife, was indicted on her prosecution, and fined and imprisoned, and a brother of the wife advanced money to pay the expenses of the prosecution, it was held that he was not entitled to recover the amount from the husband. (z)

The husband is not liable for expenses incurred by the wife without his sanction in procuring a deed of separation. (a)

And although a husband has not forcibly expelled his wife from his house, yet, if by cruelty, or threats of personal violence, or by indecent and shameless conduct, he renders it morally impossible for her to continue to cohabit and reside with him, and she accordingly leaves him, this is as much an expulsion in the eye of the law as if he had turned her out by main force. "If a husband conducts himself towards his wife with such a degree of misconduct and cruelty as to render it no longer safe for her to remain in his house, she is not to starve in the street or seek relief in the parish workhouse, but is justified in leaving her home, and goes forth into the world with a credit for the necessaries of life suitable to her condition. Such is the effect of the marriage contract, and if the husband by his misconduct forces her to leave his protection, she may seek the means of subsistence elsewhere, and those who from charity or other motives are willing to provide them are entitled to recover a compensation from the husband." (b) If the husband brings

(x) Lord Kenyon, *Harris v. Morris*, 4 Esp. 41. *Hodges v. Hodges*, 1 Esp. 441. Per Lord Eldon, *Rawlins v. Vandyke*, 3 Esp. 250. Holt, C. J., *Etherington v. Parrot*, Raym. 1006. And see *Boulton v. Prentice*, Selw. N. P. 279, 280; 2 Str. 1214, s. c. Bayley, J., *Montagus v. Benedict*, 3 B. & C. 685.

(y) *Turner v. Rookes*, 10 Ad. & E. 47; 2 P.

& D. 294, s. c. *Shepherd v. Mackoul*, 3 Camp. 826.

(a) *Grindell v. Godmond*, 5 Ad. & E. 755; 1 N. & P. 168, s. c.

(a) *Ladd v. Lynn*, 2 M. & W. 265.

(b) *Garrow, B., Emery v. Emery*, 1 Y. & J., 505.

home a loose and immoral woman, and treats her as a member of his family, this is a sufficient cause for the wife's leaving him, and so is the existence and continuance of an adulterous intercourse on the part of the husband with another woman. In general, "the jury are to determine whether the circumstances justified the wife in leaving or not." (c) And whenever the wife has once left her husband under justifiable circumstances, she is not bound to return upon the invitation of the latter, and the husband's liability for necessities furnished to her by third parties during the continuance of the separation cannot be determined by a request on his part that she will again return to his protection.

Thus, where a husband abused and brutally beat his wife, and swore that he would run her through the body, and the wife fled from the house in the night almost in a state of nudity, and went to the residence of a friend, where she was confined to her bed for several days in consequence of the ill-treatment she had received, and afterwards resided for four years in lodgings and at the houses of friends, and then went to live with her father, who brought an action against the husband for the board and lodging, and it appeared that the husband, after she had left him, had sent and offered to receive her back, which offer she had rejected, it was held that the request so conveyed to her to return home, and her refusal so to do, did not, under the circumstances, afford any answer to the action. "If, sitting in a court of law," observes Garrow, B., "we were to be of opinion that whatever had been the previous misconduct of the defendant towards the wife, the period had arrived at which he might insist upon her return, and upon her refusal, that his liability would be determined, the spiritual court might, notwithstanding, decree a divorce *a mensâ et thoro* and alimony upon the ground of cruelty; and thus a court of common law, having pronounced the obligation of the husband to supply necessities to be at an end, a court of competent jurisdiction upon the very same facts might arrive at a decree diametrically opposite. In this state of difficulty, the strong impression upon my mind, and which, upon consideration, I have been unable to remove, is that if a husband drives his wife from home by his own misconduct, and sends her forth with an implied credit arising from their relative situations, it is his duty by some positive act to determine that liability. If the wife subsequently returns, his liability is at an end; but in default of an amicable arrangement, he must go to the spiritual court, and there obtain

(c) *Hodges v. Hodges*, 1 Esp. 441. *Houlston v. Smythe*, 2 C. & P. 22, 80; 3 Bing. 127, s. c. *Aldis v. Chapman*, Selw. N. P., 10th ed. 278.

Hunter v. Blaquiere, 8 M. & P. 108, overruling *Horwood v. Haffer*, 3 Taunt. 421.

a decree for the purpose ; and until some such unequivocal act is done, a person making a claim in a court of law for necessities supplied to the wife is in my opinion entitled to recover against the husband."
 "It was argued at the bar," further observes Hullock, B., "that from the period which had elapsed, (between five and six years,) it was competent for the husband to demand her return. That circumstance would not weigh in the judgment of the spiritual court ; for it must be recollected, that by the constant practice of that court, the previous cruelty or adultery of the husband is acknowledged to be an answer to an application on his part for a restitution of conjugal rights. That court, however, is competent to investigate all the circumstances of the case, both previously and subsequently to the separation, which a court of common law cannot do ; and it appears to me, therefore, that if the husband is desirous of compelling the return of his wife, he must adopt the only legitimate course, which is to apply to the spiritual court for that purpose ; and that a court of common law cannot, whatever time may have elapsed, say that the period has arrived at which the return of the wife may be insisted on, when the consequence of her return may be to subject her to a repetition of that cruelty which in the first instance was a justification for her departure." (d)

The law does not of course sanction a wife in running into extravagance during the separation without the sanction and permission of the husband. "It makes her his agent to order such things as are reasonable and necessary for herself ; but it gives her no liberty to pledge his credit for anything beyond what would be reasonably necessary for her subsistence," (e) according to her degree and station in life and the husband's fortune. In determining what are necessities and what things are reasonable and proper for the wife, regard is to be had to the estate and circumstances of the husband, and not his rank and position in society, for "one of *high* degree may be of *low* estate." The jury must, upon a review of all the circumstances, determine whether the things were or were not proper for the use of the wife. (f)

If the husband has ill-treated the wife and turned her out of his home, he will in many instances be held liable, although she has a separate maintenance of her own, to make some provision for her, unless it appears that his means are limited, and that the funds at the wife's disposal are amply sufficient for all her reasonable requirements.

(d) *Emery v. Emery*, 1 Y. & J. 505, 506.

(e) Lord Abinger, *Emmett v. Norton*, 8 C. & P. 510. *Hardie v. Grant*, ib. 517. *Dennys v.*

Sargeant, 6 C. & P. 421.

(f) *Harvey v. Norton*, (Q. B.,) 4 Jur. 42. *Exers v. Hutton*, 3 Esp 256.

A wife who had a pension of 800*l.* a year from the crown, went to the hot-wells of Bristol for her health, and on her return her husband shut his doors against her, and refused her an allowance for her support, and would not give her any use of his table, servants, or equipage, (he being in possession of an income of 1800*l.* a year,) and it was held that he was responsible for board and lodging and necessaries furnished the wife, notwithstanding the possession by her of the pension from the crown. "Here," it was observed by the court, "is no *agreement* for a separation, the husband has sent her adrift by shutting his doors against her. *He* allows her no maintenance, nor any support at all."*(g)*

Separation by mutual consent.—If the separation is a separation by mutual consent, the husband is responsible for the payment of board and lodging and necessaries furnished to the wife during the continuance of such separation, unless she has a competent provision from him or from some fund at her own disposal; and if she has such a provision, it lies on the husband to show it.*(h)* If the wife leaves her home in consequence of a quarrel with the husband, in which they are mutually to blame, and obtains lodging and the necessaries of life at the hands of a third party, and the husband, knowing where she is domiciled, neglects to require her to return to him, he will be responsible for the board and lodging and necessaries provided for her.*(i)*

In all cases of separation by mutual consent, the husband may put an end to his liability by requiring the wife to return to him, and prohibiting parties who have been previously in the habit of dealing with her from any longer continuing to serve her.*(k)* And his liability is in all cases dependant upon the pecuniary means at the wife's disposal. If she has a separate portion, or a separate income sufficient for her decent and comfortable support and maintenance settled upon her for her separate use, the husband is not liable for her debts and expenses, whether such separate fortune or income is derived from the husband himself or from her own relations and friends,*(l)* and whether the parties who have supplied her with goods were or were not aware, at the time of the dealing, of the separate means at her own disposal. Notice to the tradesman of the allowance is not material, and need not be proved.*(m)* And the sufficiency or insufficiency

(g) *Thompson v. Henry*, 4 Burr. 2178. *Turner v. Rookes*, 10 Ad. & E. 47; 2 P. & D. 294 s. c.

(h) *Dent v. Scott*, Aleyn. 61. *Dixon v. Hurrell*, 3 C. & P. 719.

(i) *Reed v. Moore*, 5 C. & P. 200.

(k) *Hindley v. Westmeath*, 6 B. & C. 200.

(l) *Liddlow v. Wilmot*, 2 Stark 86. *Clifford v. Laton*, 1 M. & M. 102. *Hodgkinson v. Fletcher*, 4 Campb. 70.

(m) *Mizen v. Pick*, 3 M. & W. 481. *Tod v. Stokes*, 12 Mod. 245.

of the funds for the suitable maintenance of the wife is a question to be determined by the jury.

A mere covenant or agreement on the part of the husband to make an allowance for the wife's maintenance will not of itself exonerate the husband from his liability. He must show that the covenant has been fulfilled, and that the allowance has been regularly paid, and that it is sufficient or has been accepted by the wife as sufficient for her suitable support.(n)

Of the wife's continued exemption from liability.—If the husband, from any of the preceding causes, is absolutely discharged from his obligation to maintain the wife, the latter does not, in consequence thereof, acquire any power or capacity of contracting on her own account, so as to incur any liability upon her contracts. She herself remains exempt by reason of the coverture from all personal responsibility *ex contractu*, and he who trusts her has no other security than her honour for the fulfilment of her engagements.(o)

A divorce *a mensâ et thoro* does not, as we have already seen, dissolve the marriage tie, or invest the wife with any of the attributes of a feme sole. It is merely an order by the ecclesiastical court for the separation of the parties from bed and board and cohabitation, and for a provision by the husband for the separate support and maintenance of the wife, and does not alter the legal character and position of the parties to the marriage otherwise than by ordering a discontinuance of the cohabitation. The wife has no power during such a separation, of contracting on her own account so as to incur any legal liability upon her contracts.(p)

The husband's rights, as we have before seen, remain unaltered by such a divorce, (ante, 341,) and his liabilities are only affected by it as they are by any other ordinary separation. If the divorce has not been accompanied with a decree for alimony, or the wife has not been regularly paid her alimony according to the decree, and has no sufficient funds at her own disposal for her maintenance, the husband will continue liable for the payment of debts incurred by her in obtaining the means of subsistence. "A mere decree for alimony is not sufficient to discharge or exonerate the husband. But the *payment* of it should be proved, if not, a tradesman may maintain an action of this description as if no such decree had existed."(q)

(n) *Nurse v. Craig*, 2 N. R. (5 B. & P.) 148. *Burgett v. Booty*, 8 Taunt. 343.

(o) *Gilchrist v. Brown*, 4 T. R. 766. *Marshall v. Rutton*, 8 T. R. 546. *Murray v. Barlow*, 3 M. & K. 220. *Beard v. Webb*, 2 B. & P. 93.

(p) *Ellah v. Leigh*, 5 T. R. 679. *Marshall v.*

Rutton, 8 T. R. 546. *Faithorne v. Blaquiere*, 6 M. & S. 73.

(q) *Best, C. J., Hunt v. Blaquiere*, 3 M. & P. 119; 5 Bing. 550 a. c. *Wilson v. Smyth*, 1 B. & Ad. 801. *Keegan v. Smyth*, 5 B. & C. 375.

SUSPENSION *of the COVERTURE.*

TRANSPORTATION *for a term of years* operates as a suspension of the civil and marital rights of the husband during the continuance of the term of banishment,^(r) and until he has actually returned to his country^(s) after the expiration of his sentence. He is not, when the exile is a mere temporary exile, civilly dead,^(t) but the effect as regards the liability of the wife to be sued as a feme sole is precisely the same as if he were so. But a voluntary absence beyond the sea, on the part of the husband, or a compulsory absence in the service of the state, does not in anywise alter or affect the legal position of the wife.^(u) If the husband is an alien *ennemi* he has no legal existence in this country, and so long as he remains in that situation and position, his wife resident here is looked upon as a feme sole, and she is, consequently, liable to be sued upon all contracts entered into by her, just the same as if she were a widow.^(x) But if he becomes an alien *ami*, and has at any time resided in this country, the law recognizes and regards his wife in the same light as any other married English-woman.^(y)

It has been said, that if being an alien he resides abroad, and has no animus revertendi^(z) to this country, or if he has never been in England at all, the wife may be treated and sued as a feme sole;^(a) but it seems to be considered by the Court of Exchequer, that the wife of an alien *ami* cannot be sued upon any contract that she may enter into in this country any more than any other married woman.^(b)

DISSOLUTION *of the COVERTURE.*

DIVORCE *a vinculo matrimonii*.—Adultery is held by the ecclesiastical courts to be cause only for a separation from bed and board, and not for a DIVORCE *a vinculo matrimonii*. A dissolution of the marriage contract, and a restoration of the parties to the situation and position of single persons, is only to be obtained through the medium of an act of parliament. As a preliminary step to the obtaining of such a divorce, a decree from

(r) Tindal, C. J., *Ex parte Franks*, 1 M. & Sc. 11. *Sparrow v. Carruthers*, cited 1 T. R. 6. *Ld. Mansfield*, ib. 7.

(s) *Carrol v. Blencon*, 4 Esp. 28.

(t) "If the husband, by act of parliament, has judgment to be exiled but for a time, which some call a relegation, that is no civil death."—Co. Litt. 133 a.

(u) *Marsh v. Hutchinson*, 2 B. & P. 226. *Farrar v. Countess Granard*, 4 B. & P. 80.

(z) Holt, C. J., *Derry v. Duchess of Mazarine*, 1 Raym. 147; 1 Salk 116.

(y) *Kay v. Duchess of Piennes*, 3 Campb. 122. *Barden v. Keverberg*, 2 M. & W. 65.

(z) *Walford v. Duchess of Piennes*, 2 Esp. 554. *Frank v. Duchess of Piennes*, ib. 587.

(a) *Kay v. Duchess of Piennes*, 3 Campb. 122. *Heath, J.*; *Marsh v. Hutchinson*, 2 B. & P. 233.

(b) *Barden v. Keverberg*, 2 M. & W. 65.

the ecclesiastical court must be obtained for a separation *a mensâ et thoro*; (c) and if the husband is the petitioner for the act of parliament, it must be shown that an action for damages for criminal conversation with the wife has been brought by him, and that he has obtained a verdict and judgment in such action; or sufficient cause must be shown to a Committee of the House of Commons, why such an action has not been brought, and such a judgment obtained. (d) As the wife cannot maintain an action against a female with whom her husband has committed adultery, no evidence as to the bringing of an action and recovering judgment is of course necessary when the wife is a petitioner before Parliament.

If the bringing of an action by the husband, and the following it up to a verdict and judgment, is prevented by the flight or concealment of the adulterer, or by any other cause beyond the control of the husband, there is a sufficient excuse for his non-compliance with the standing orders of the house in that respect, and the adultery may be proved by other evidence. Parliament will not in general lend any assistance to petitioners for divorce bills, who have themselves been guilty of the crime of adultery, or who have done any act amounting to a condonation of the adultery charged against the party they proceed against, or who have connived at, or in any way been instrumental to their own dishonour, or who lie by and slumber over their own wrongs.

Civil death of the husband.—If the husband has been banished by act of Parliament, or has been transported beyond the seas for the term of his natural life, he is civilly dead, and the wife is forthwith remitted to the situation and position of a feme sole. (e) If a husband has separated himself from his wife, and has not been heard of for the space of seven years, he is presumed to be actually dead. "The presumption of the duration of life with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living." (f) If, therefore, it be shown that the wife has been living apart from the husband for a space of time exceeding seven years, that the latter has not during all that period been heard of, this is *prima facie* evidence of his death, and the wife may be sued as a widow. (g)

Effect of the dissolution of the coverture.—When the marriage tie has been dissolved by a divorce *a vinculo matrimonii*, or by the actual or civil

(c) 41 Lord's Jour. 517.

(d) Commons' Journals, 30th June, 1801. Ed. 1838, p. 21.

(e) Co. Litt. 133, a. *Countess of Portland v. Prodgers*, 2 Vern. 104. *Ex parte Franks*, 1 M. & Sc 11. *Newsome v. Bowyer*, 3 P. Wms.

37. As to the effect of transportation for a term of years, see ante, 637, n. (i)

(f) *Ellenborough, C. J.*, 6 East, 85. *Watson v. England*, 14 Sim. 28.

(g) *Hopewell v. De Pinna*, 2 Campb. 113.

death of the husband, all the debts contracted by the wife prior to the marriage, and which have not been barred by the Statute of Limitations, survive to her, and she may then be charged with the payment of them. (h) She becomes also from that time, to all intents and purposes, a single woman. Her power of contracting on her own account is forthwith restored, and she becomes responsible for the fulfilment of all contracts she may afterwards enter into, just the same as if she had never been married. But she is not responsible upon any contract made during coverture, or upon any promise made after the death of the husband, to pay for things furnished her in his lifetime." (i)

Contracts entered into by the wife after the death of the husband, but before his decease was known, are not binding upon the wife, and she cannot herself be made responsible for the performance of them. Thus where a husband set out on a voyage to China, leaving his wife and family at his house in England, and the plaintiff, a butcher, supplied them with meat from the time of the husband's departure until the news of his death arrived in England, and for some time afterwards; and it was held that the widow was not responsible for the meat supplied to her between the 14th of October, the day on which the husband died, and the 13th of March following, the day on which the news of his death reached his family. (k)

If the coverture has been dissolved by a divorce *a vinculo matrimonii*, the husband is of course forthwith discharged from all liability in respect of his wife's debts, (l) unless after the divorce he has cohabited with her, and lived with her as his mistress, in which case he might be liable, as we shall presently see, in another character.

LIABILITIES *resulting from* REPUTED MARRIAGES *and from* COHABITATION.

Contracts of kept mistresses.—"If a man has permitted a woman to whom he was not married to use his name, and pass for his wife, and in that character to contract debts, he is liable for her debts, whether the tradesman who furnished the goods knew the circumstance to be so or not. He gives her a credit from his name and cohabitation, and it is not to be supposed that the tradesman could look to the credit of a woman of that description, and not to that of the man by whom she was supported.

(h) *Woodman v. Chapman*, 1 Campb. 188.

(i) *Mayer v. Haworth*, 8 Ad. & E. 467.

(k) *Smout v. Ilbery*, 10 M. & W. 1. And see *Blades v. Free*, 9 B. & C. 167, as to the

liability of the husband's executors in such a case.

(l) *Anstey v. Manners*, Gow, 10.

But this must not be taken to apply to the case of a common strumpet, who may assume the name of a person without his authority, from having casually known him; it must be where the man permits the woman to assume his name, where she lives in his house, and is part of his family." (m) And it matters not whether the man so acting is a married man or a single man. If he lives with the woman, and gives her every appearance of being his wife, the proof of a previous marriage with some other woman cannot exonerate him from liability. (n)

If the woman does not assume the name of the man, and pass as his wife, he will not be liable upon any contracts that he has not expressly sanctioned. He will not be responsible for her board and lodging, unless he has himself accompanied her to take lodgings, or has been in the habit of lodging and sleeping with her, and taking his meals with her, in which case it would be a question for a jury to determine whether the board and lodging and necessaries were supplied upon the credit of the man or the woman, or upon the joint credit of both of them.

The liabilities resulting from a connexion of this description, may of course at any time be put an end to by breaking off the connexion, discarding the woman, and giving notice to all persons who have been in the habit of dealing with her on the credit of her supporter or pretended husband, that the latter will no longer be responsible for any debts or engagements she may contract. But having once held her out as his wife, the reputed husband is, of course, bound to produce conclusive evidence that they never were married, in order to escape effectually from the difficulties of his position. (o) If the woman is not exclusively the mistress of the party sought to be charged, if she is a common prostitute, and the things are furnished to her for the purpose of enabling her to earn money by prostitution, and pay for them out of such earnings, the party furnishing them has no claim against anybody for payment. (p)

(m) Per Lord Kenyon, *Watson v. Threlkeld*, 2 Esp. 637. *Car v. King*, 12 Mod. 372. *Hudson v. Brent*, Esp. N. P. 124.

(n) *Robinson v. Nason*, 1 Campb. 245.

(o) *Munro v. De Chamant*, 4 Campb. 215.

(p) *Jennings v. Throgmorton*, R. & M. 251.

Girardy v. Richardson, 1 Esp. 12. *Howard v. Hodges*, 1 Selw. N. P. 63. *Appleton v. Campbell*, 2 C. & P. 347. *Crisp v. Churchill*, cited 1 B. & P. 340. *Bowry v. Bennett*, 1 Campb. 348.

CHAPTER XXII.

CONTRACTS FOR THE LETTING AND HIRING OF REALTY AND PERSONALTY.

SECTION I.—*Landlord and Tenant.*—Nature and creation of leases—Ascertainment of the subject matter of the demise—Commencement and duration of the term—Leases for lives and terms of years—Leases from year to year—Quarterly, monthly, and weekly hirings—Leases at will—Tenancy by sufferance—Defeasible leases—Disclaimer and forfeiture—Surrender of leases—Notices to quit—Double yearly value and double rent for holding over—Tenant's right to emblements and away going crops—Fixtures removable by the tenant—General duties, obligations, and liabilities of lessor and lessee—Covenants and promises to pay rent—Lessor's power of distress for rent—Distress by agents—Distress by joint tenants and tenants in common—Distress in the case of fraudulent removal—Things distrainable—Things privileged from distress—Lessor's right to a year's rent from the sheriff—Impounding goods distrained—Tenant's right to replevy—Notice of distress and inventory—Appraisal and sale—Sale of growing crops—Costs and expenses of the distress—Excessive distresses—Liability of the tenant for use and occupation—Tenant's liability to repair—Express and implied covenants and agreements to repair—Tenant's liability for the mismanagement of farms and lands—Short form of lease under 8 and 9 Vict. c. 124.

SECTION II.—*Letting and hiring of personal chattels.*—General duties, obligations, and liabilities of the letters and hirers of chattels—Letting and hiring of ships, carriages, horses, implements of trade, &c.—Loans of money at interest.

SECTION III.—*Letting and hiring of furnished houses and lodgings, stowage and places of deposit and accommodation in public inns.*—Liabilities of lessors and lessees of furnished apartments, store-houses, and places of deposit—Liabilities of common innkeepers—Distinction between a lodging-house-keeper and a common innkeeper—Of the common law duty of a common innkeeper to furnish lodging and necessities to all comers, and safe places of deposit for their goods and chattels—Liabilities of innkeepers for the loss of goods deposited in their inns.

SECTION I.

LANDLORD AND TENANT.

A LEASE or CONTRACT for the letting and hiring of REALTY is a contract whereby the temporary use and possession of a house or land are granted

by the owner to the hirer for a stipulated or implied remuneration. (a) He who grants the possession and use of the property to be enjoyed for hire, is called the lessor, or landlord; and he who has the enjoyment of it, paying the rent or hire, is called the lessee, or tenant. In the Roman law, the former was called "locator," the latter "conductor;" and the contract itself, *locatio rei*. In the French law it is termed *bail a loyer*, or a bailment for hire; the lessor is called the *baillieur*, or *bailor*, and the hirer the *preneur*, or *locataire*. (b) If the land or realty is granted by deed to be enjoyed for a term, without any payment of rent by the grantee, (c) the grant amounts to a *COMMODATUM*, or gratuitous loan of the use of the land, (d) and does not create a contract of letting and hiring between the parties.

Of the creation of leases.—It is a rule of law, that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession and profits of the land, and the other come into them for such a determinate time, for a certain hire or rent, such words, whether they run in the form of a license covenant or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose." (e) Whatsoever word will amount to a grant, will amount to a lease. And therefore a lease may be made by the word give, betake, or the like. The word *locavit* also is a good word. And if A. do but grant and covenant with B., that B. shall enjoy such a piece of land for twenty years, this is a good lease for twenty years. (f)

Formerly an estate of freehold could not be granted to commence *in futuro*: therefore, if a lease for life, which is a freehold estate, was granted to commence from a day after the date of the lease, it was void, unless after the day on which the lease was to take effect, the lessor himself in person did make livery of seisin, *secundum formam chartæ*. (g) Now, however, it has been enacted, (8 and 9 Vict. c. 106, s. 2,) that "from and after the first of October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be

(a) On peut le définir un contrat par lequel l'un des contractans s'oblige de faire jouir ou user l'autre d'une chose pendant le temps convenu et moyennant un certain prix que l'autre de son côté s'oblige de lui payer. *Polhier. Contrat de Louage*, part. 1, ch. 1.

(b) Dict. de l'Acad. *Encyclopedie du Droit*, title, *BAIL*.

(c) *Rex v. Fillongley*, Cald. 569. *Rex v. Collett*, Russ. & Ry. 498. *Rex v. Jobling*, ib. 525.

(d) *Post*, ch. 25, s. 3. *Doe d. Hughes v.*

Derry, 9 C. & P. 494. *Hunt v. Colson*, 3 M. & Sc. 790. *Bertie v. Beaumont*, 16 East, 33.

(e) *Bac. Abr. Leases*, (K.) Ante, 163, 164. *Mayor, &c. of Colchester v. Brooke*, 15 Law J. N. S. (Q. B.) 173.

(f) *Shep. Touch. ch. 14, 272. Bro. Abr. (Lease)*, pl. 60.

(g) *Shep. Touch. 272, 219. Freeman v. West*, 2 Wils. 165. *Pugh v. Duke of Leeds*, Cowp. 714, 725.

deemed to lie in grant as well as in livery." (h) No estate of freehold, however, in lands, tenements, or hereditaments, can now be created by livery of seisin only, as we have previously seen. (i) The lease or grant must be put into writing, and signed by the lessor or grantor, or by his authorized agent; and if made subsequently to the first of January, 1845, it must be sealed and delivered as a deed. (k) All leases, also, for terms of years, exceeding three years in duration, must now be made by deed; but a lease for three years, or any less time, may still be created by parol contract. (l)

A contract for the letting and hiring of realty, with its accompanying duties and responsibilities, may likewise be created by implication of law from the relative situations and circumstances of the parties, and the silent language of their conduct and actions, as well as by express words and stipulations. Whenever the house or land of one man has been occupied and used by another, the *prima facie* presumption is, that the use and occupation are to be paid for, and the landlord is entitled to maintain an action to recover a reasonable hire and reward for the use of the land, unless the tenant can show that he entered into possession of the property under circumstances fairly leading to an opposite conclusion. If the tenant is a pauper, who has been provided with a dwelling-house by the parish, or an old servant, who has been accommodated with a cottage and garden by his master, or the son or other near relation of the owner, the possession and occupation do not raise a presumption of a contract of letting and hiring between the parties. The transaction amounts only to a *commodatum*, or gratuitous loan of the property for use. The possession of the tenant is the possession of the landlord or owner, and the tenant may at any time be removed at the will and pleasure of the latter. (m)

Ascertainment and identification of the subject matter of the demise.

—Any general description will suffice to pass the demised premises, provided the object referred to can be ascertained with certainty. "Amongst words whereby things do pass, some are collective, compound, and general, comprehending many things, and some words are simple and particular, comprehending one thing only. . . . The word farm," for example, "is a compound word, and doth comprehend many things, and therefore

(A) But the deed must have a release stamp. *Ib.*

(i) *Ante*, 91.

(k) 29 Charles 2nd, c. 3, s. 3; 7 and 8 Vict. c. 76, s. 4; 8 & 9 Vict. c. 106, s. 3.

(l) *Ib.* In Holland, and most parts of the continent, leases of farms are required to be authenticated by some written instrument. "Apud

nos locatio agrorum non procedit sine interventu instrumenti aut publici aut privati, nec absque instrumento locationis ullo colono jus est agro conducto frui. Vin. Com. Lib. 3, tit. 25, 758.

(m) *Bertie v. Beaumont*, 16 East, 33. *Hunt v. Colson*, 3 M. & Sc. 791. *Doe d. James v. Stanton*, 2 B. & Ald. 373.

by the grant of a FARM will pass a messuage and land, meadow pasture, woods, &c., thereunto belonging, or therewith used, for this word doth properly signify a capital or principal messuage, and a great quantity of demesnes thereunto appertaining. . . . By the grant of a MESSUAGE doth pass the dove-house, dwelling-house, the orchard, garden, and curtilage, *i. e.* a small yard or field, or piece of ground, not exceeding an acre or thereabouts, that has usually gone with the house. . . . By the grant of a GRANGE will pass a house or edifice, not only where corn is stored, such as a barn, but necessary places for husbandry, as stables and lofts for hay and horses and cattle, a curtilage and the close wherein it standeth at least. . . . The word MANOR is also a word of vast extent, and comprehendeth a vast variety of things,"(n) and some words are so general in their signification (such, for example, as the words tenements and hereditaments) as to comprise every description of realty that can be granted and possessed. The term LAND is also nomen generalissimum; in its primary sense it means arable land; in a larger sense meadow and pasture as well as arable land, "also woods moors, waters, marshes, furzes, heaths, and such like, and the castles, houses, and buildings thereupon.(o) By a lease of the issues and profits of land, the land itself will pass, "for to have the issues and profits and to have the land is all one."(p)

If a general and comprehensive term and description be used in a lease, all the things usually comprehended under such general term and description will pass to the lessee, unless the surrounding circumstances, and the relative situations and interests of the contracting parties plainly show that such could not have been their intention. We have already seen that in order to give a correct interpretation to the words and language of a written instrument, we may place ourselves in the same situation as the parties who made the contract, view the circumstance as they viewed them, and so judge of the meaning of the words, and of the correct application of the language to the objects professed to be described. (Ante, 147.) By parol evidence of extrinsic circumstances, a general and comprehensive term may be controlled and restricted so as to pass much less than is ordinarily comprised under the common legal acceptance of the term, and on the other hand a particular and limited term and description may be extended and enlarged so as to comprehend and include much more than it generally comprises, in order to effectuate the plain and obvious meaning of the parties.

A lessor demised a messuage and piece of ground with the appurtenances to the defendant, and the latter, after he had taken possession, laid claim

(n) Shep. Touch. 90—92.

(o) Shep. Touch. 91.

(p) *Parker v. Plummer*, 1 Cro. 190; Co. Lit. 4 b.

to a cellar under the messuage, on the ground that it had passed to him under the general description contained in his lease, and it was held that the lessor might show, through the medium of parol evidence, that at the time of the demise, and previous thereto, the cellar had been severed from the messuage, and used as a wine-cellar by a wine merchant under a separate and distinct lease, at a separate rent, which was known to the defendant at the time of his acceptance of the lease, and therefore that it could not have been the intention of the parties that the cellar so occupied by a third party should pass to him under the general description of the messuage and ground thereunto adjoining.(g)

Under the word "cottage or house," on the other hand, land may pass if it can be shown that the land has for a length of time been used and occupied with the cottage or house at one entire rent, and has been commonly reputed to be part and parcel thereof. "Being found to be all one, it passeth well by the lease."(r) Divers things that by continual enjoyment with the principal thing demised, have by common reputation been deemed to belong to it, may well pass as part and parcel of the principal thing demised, if extrinsic circumstances show that such must have been the intention of the parties. If the subject matter of the demise has acquired a name by reputation, it may pass by such acquired name as well as by any other. "If a manor or farm be commonly called by the name of a messuage, then by the grant of a messuage the whole manor or farm may pass . . . and where land, meadow, and pasture belonging to farm buildings, are called altogether by the name of a grange, there perhaps by this word the whole may pass.(s)

If the principal description of the subject-matter of the demise is sufficient, with the aid of parol evidence of extrinsic circumstances, to enable us to apply the description with certainty, the demise is valid, although the description may not be correct in all its details and minute particulars. Thus if the amount of rent at which lands are let, is misrecited, or there is a mistake in quantity or in the names of the occupiers, the lease is good, if the description is otherwise sufficient, and can be applied with certainty so as to establish the identity of the subject-matter of the demise,(t) for in all cases "where there is a sufficient description to ascertain the thing demised, a part of the description which is inaccurate may be rejected."(u)

(g) *Doe v. Bunt*, 1 T. R. 703, 704. *Bryan v. Wetherhead*, 3 Cro. 18. *Keerslake v. White*, 2 Stark. 508. Ante, 148.

(r) *Gennings v. Lake*, 3 Cro. 169; *Anderson, J.*, 1 Cro. 16; *Lea, C. J.*, Palm, 376. *Ongley v. Chambers*, 1 Bing. 496—499.

(s) *Shep. Touch.* 93, 94.

(t) Sav. 114, *Blague v. Gold*, 3 Cro. 473; 2 Cro. 84. *Plowd.* 191, *Windham v. Windham*, *Dyer*, 376, b.; *Bac. Tr.* 102, 105. *Goodtitle v. Southern*, 1 M. & S. 301. *Doe v. Galloway*, 5 B. & Ad. 49; 2 N. & M. 41, a. c. *Pim v. Currell*, 6 M. & W. 234, 269.

(u) *Tindal, C. J.* 1 M. & S. 351.

When a man grants a thing to be used for hire, he grants it with all such appurtenances and accompaniments as properly belong to it, and are necessary to enable the hirer to have that use and enjoyment of the thing demised for which the hire is agreed to be paid. "When any thing is granted, all the means to attain to it and all the fruits and effects of it are granted also, and shall pass inclusive, together with the thing by the grant of the thing itself, without the words *cum pertinentiis*, or any such like words *cuicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non potuit*, as by the grant of a ground is granted a way to it, (i. e. if a man grants a piece of ground in the middle of his own property, he at the same time impliedly grants a way to come at it, and the grantee may cross the grantor's land for that purpose without trespass.)(*x*) By the grant of mines is granted power to dig them; by the grant of fish in a pond is granted power to come upon the banks and fish for them; by the grant of mills, the waters, floodgates, and the like, that are of necessary use to the mills, do pass; and by the grant of a house the estovers appendant thereunto will pass. The incident necessary appendant and regardant shall, in most cases, pass by the grant of the principal, but not *e converso*, for the principal doth not pass by the grant of the incident, *accessorium non ducit sed sequitur suum principale*. . . . And that which is parcel or of the essence of a thing, albeit at the time of the grant it be actually severed from it, doth pass by the grant of the thing itself.(*y*)

But a grant of realty to be used and enjoyed by the grantee for a term for rent or hire, transfers to the latter a right only, as we shall presently see, to use the subject-matter of the demise in the way that it had been previously used and enjoyed. Many things, therefore, which pass by a grant in fee, so as to give the grantee an absolute dominion over them, do not pass by a lease so as to give the lessee a right to use and enjoy them as part of the proceeds and profits of the subject matter of the demise. The lessee, for example, has a right only to the casual profits of trees; he has no right to cut them down and sever them from the freehold and inheritance. He has a right to the profits of mines and quarries opened at the time of the demise, but has no right to open fresh mines and quarries where none before existed.

Of the commencement and duration of the term.

Leases for LIVES, as well as leases for TERMS of YEARS, may now be

(*x*) Shep. Touch. 89. See *Morris v. Edgington*, 3 Taunt. 31. *Kooystra v. Lucas*, 5 B. & Ald. 834. *Harding v. Wilson*, 3 D. & R. 290; 2 B. & C. 96. *Wilson v. Bagshaw*, 5 M. & R.

451, as to grants of rights of way.

(*y*) 11 Co. 50 a. Pothier, Louage, No. 54. Shep. Touch. 89, 90.

made to commence from a day that is passed, or from a day to come, as well as from the day of the making of the lease. (z) If the lease is limited to commence "from the date," or "from the day of the date," the words are either inclusive or exclusive, according to the context and subject matter of the written instrument, and the apparent intention of the contracting parties. (a) A lease "from the day of the date," and "from henceforth," is the same thing; if, therefore, a lease be dated the first of December and be granted to commence "from henceforth," and be sealed and delivered on the twelfth of December, the lease commences in contemplation of law from the first of December. (b) And where two periods are mentioned from which the term is to commence, the legal construction is that it shall begin from the first of the two, provided the extrinsic circumstances are not hostile to such a construction. (c) If the lease is made to commence from a day that is past, the lease takes effect in point of computation from that day, but in point of interest from the day of the delivery. (d)

If no time is mentioned for the commencement of the lease, or if the date is an impossible date, the term will be deemed to begin from the day of the delivery of the deed, or of the making of the demise, if extrinsic circumstances do not rebut such a presumption. (e) If upon the face of the written instrument the time of the commencement of the term is uncertain, and cannot be ascertained and determined by the aid of parol evidence of extrinsic circumstances, the lease is void. (f) The commencement of the term is necessarily controlled and regulated by extrinsic circumstances (such as the occupied or unoccupied state of the demised premises, the surrender or determination of previous leases, and the period of the termination of an existing tenancy,) as well as by the express terms and language of the deed. (g)

A lease was dated 25th March, 1783, and the term was granted to commence "from the 25th March now last past;" it was proved that the deed was not executed until some time after the day on which it was dated, and it was held that the term commenced on the 25th of March, 1783, and not on the 25th of March, 1782. (h)

Duration of terms of years.—We have already seen that all leases for

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| (z) 8 & 9 Vict. c. 106, s. 2, ante, 642. | R. 507. <i>Higham v. Cook</i> , 4 Leon. 144, Co. Lit. |
| (a) <i>Pugh v. Leeds</i> , Cowp. 714. | 46, b. |
| (b) <i>Llewellyn v. Williams</i> , Cro. Jac. 258. | (f) Anon. 1 Mod. 180. <i>Enys v. Denithorne</i> , |
| (c) <i>Dyer</i> , 312, b. <i>White v. Nicholson</i> , 18 M. | 2 Bur. 1195, 1197. |
| & W., 707. | (g) Ante, 147, 148. |
| (d) <i>Moore v. Hussey</i> , Hob. 18, 2 Ro. Abr. 850. | (h) <i>Steele v. Mart</i> , 6 D. & R. 392; 4 B. & C. |
| (e) <i>Stiles v. Wardle</i> , 4 B. & C. 908; 7 D. & | 272, s. c. |

terms of years exceeding three years in duration, in lands, tenements, and hereditaments are void, unless created by deed, and that the parties who have taken possession under them cannot have a greater estate than a lease from year to year. (Ante, 90, 91.) If the land is demised "for a year, and so on from year to year," or "for a year and afterwards from year to year," this is a lease for two years certain at least. (i) But if the demise be for one year certain, and six months' notice afterwards, the lease is only a lease for a year. (k) If the land is expressed to be demised for years generally, the lease is likewise said to be good for two years at the least. (l) A house and land were demised for the term of six months, and so on from six months to six months, until one of the parties should give the other six calendar months' notice of his intention to determine the tenancy, and it was held that this was a lease for a year at the least. (m)

If a lease be granted for seven, fourteen, or twenty-one years, and the lessee enters and takes possession of the demised premises, the legal construction of the lease is, that the lessee is entitled at his option to take that term which is most beneficial to himself. The lessee therefore has the option, at the expiration of the first seven years, of continuing the lease on for another seven years, and after that term has expired, for the full period of twenty-one years if he chooses so to do, (n) the courts leaning in favour of that construction which is the most favourable to the lessee.

A lease was granted for twenty-one years, with a covenant by the lessor that the lessee should have the demised premises for twenty-one years more after the expiration of the said term, and so from twenty-one years to twenty-one years until ninety-nine years thence next ensuing should be complete and ended, and it was held that the lease ought to be construed most strongly against the grantor, and therefore that the first twenty-one years should not be included in the ninety-nine years, and consequently that there were two distinct leases, viz. one for twenty-one years and another for ninety-nine years, to take effect (at the option of the lessee) after the determination of the first. (o) The authority of this case may, however, be doubted. A lease was granted for three years, and

(i) Bac. Abr. Leases, (L) 838. *Dunn v. Cartwright*, 4 East, 29. *Doe d. Chadborn v. Green*, 9 Ad. & E. 658; 1 P. & D. 454. *Legg v. Strudwick*, 2 Salk. 414; 18 Hen. 8, 15. (B.)

(k) *Thompson v. Maberly*, 2 Camp. 573.

(l) Bro. Abr. Lease, 13; 6 Co. 85, 86.

(m) *The Queen v. Chawton*, 1 Ad. & E., n. s.

247; 4 P. & D. 525.

(n) *Dunn v. Spurrier*, 3 B. & P. 404. *Prie v. Dyer*, 17 Ves. jun. 558. *Doe v. Dixon*, 9 East, 15. *Goodright v. Richardson*, 3 T. R. 462. *Ferguson v. Cornish*, 2 Bur. 1032.

(o) *Manchester College v. Trafford*, 2 Show, 32; 2 Lev. 242, s. c.

so on from three years to three years until ten years was expired, and it was held that this was a lease but for nine years, and that the odd year should be rejected. (p)

A simple contract in writing was entered into between a landlord and tenant, whereby the former agreed to let, and the latter agreed to take a messuage, &c. at 40*l.* per annum, clear rent, to be paid quarterly, and the lessor agreed not to raise the rent nor turn the tenant out of possession so long as the rent was duly paid quarterly, and it was held that this operated as an agreement for a tenancy from year to year. If it was intended to have any longer duration it must be construed as a lease for life, and would then be void as not being creatable by parol. (q)

If in a lease under seal the lessor covenants not to raise the rent nor turn out the tenant, so long as the rent is duly paid, this is a lease for life; if the undertaking is contained in a lease not under seal, it operates only as a simple contract or agreement, for a breach of which the tenant may recover damages by way of action from the lessor, but it does not prevent the latter from ejecting the tenant after the ordinary notice to quit. (r) If the full extent and duration of the term are uncertain, but there is a certainty for some specific portion of time, the lease will be good for such term or portion of time, and void as to the residue. (s) If no time at all is mentioned for the duration of the term, and there has been no entry upon the land nor payment of rent, there is no lease at all; but if the lessee has actually entered and taken possession, the duration of the term of hiring will be regulated by the nature of the subject matter of the demise, the times limited for the payment of the rent, and the custom of the country where the property is situate.

Leases from year to year.—In the case of a general demise of farms or lands, no term or time of holding being mentioned, the presumption is always in favour of a yearly hiring (t) in the absence of an express limitation of the term, as the harvest is gathered but once a year, and the enjoyment of the produce is reasonably presumed to have been the consideration for the payment of the rent. If a corn-field or an orchard be demised at a customary and ordinary rent, the hiring will be deemed to be for a year, and so on from year to year, in order that the tenant may reap the harvest and gather the fruits and produce of the soil when they come to perfection, as the rent is reasonably presumed to be paid for the enjoy-

(p) *Rec. Abr. (Leases, L. 3)* p. 838; 1 *Roll. Abr.* 850; A. pl. 2.

(q) *Doe v. Browne*, 8 *East*, 159.

(r) *Ib.*

(s) *Gwynne v. Mainstone*, 3 C. & P. 302, 304.

(t) 13 *Hen. 8*, 15 b. *Clayton v. Blakely*, 8 T. R. 3. *Doe v. Watts*, 7 T. R. 85.

ment thereof, and not for the barren occupation of the land itself. "If the produce of the demised lands requires two years to come to perfection, as if it be liquorice, madder, &c., a general holding will, it seems, enure as a tenancy from two years to two years, and cannot be determined by a notice to quit at the end of the first or the third year." (u)

The same rule prevails in the French law. "If the parties," observes Pothier, "have omitted to express the duration of the term, the lease will nevertheless be valid. If it is a demise of an inheritance of which the fruits are gathered every year, such as a meadow, a vineyard, &c., the lease is deemed to have been made for a year. When it is a lease of an inheritance of which the fruits are gathered at intervals of several years, the lease is deemed to continue for all the time that is requisite to enable the tenant to gather in the fruits. For example, if after having fished my fish-pond, which has been accustomed to be fished every three years, I grant it to farm to another at a certain price, without expressing the term of hiring, I am deemed to have demised it for the term of three years." (x)

If an intended lessee enters into possession of realty under an agreement for a lease, he is tenant at will until the lease is made, but if he remains in possession for a lengthened period, and pays rent, he becomes tenant from year to year until the lease is duly executed according to the agreement. (y) And if he holds over after the expiration of the term, and the landlord receives from him rent which has accrued due subsequently to the expiration of the lease, he becomes a tenant from year to year upon the terms of the original demise. (z) If a man takes possession of premises under an invalid lease from a tenant for life, and the remainderman accepts rent or does any act recognizing the party in possession, as his tenant, the latter forthwith becomes a lessee from year to year. (a) So if a man enters into possession as an intended purchaser, and agrees "to pay and allow" to the vendor "at the rate of 100*l.* per annum from the time of taking possession of the premises until the completion of the purchase in equal half-yearly payments," he becomes tenant to the intended vendor "at a fixed rent of 100*l.* per annum, payable half-

(u) *Adams on Eject.* 3rd ed. 138.

(x) Poth. *Louage partie*, 1 ch. 2, art. 4, 28.

(y) *Mann v. Lovejoy*, R. & M. 355. *Doe v. Smith*, 1 M. & R. 187. *Hamerton v. Stead*, 5 D. & R. 206; 3 B. & C. 478, s.c. *Knight v. Bennett*, 11 Moore, 225; 3 Bing, 861. *Doe v. Awey*, 12 Ad. & E. 476; 4 P. & D. 177, s.c. *Chapman v. Towner*, 6 M. & W. 100. *Doe d.*

Rogers v. Pullen, 3 Sc. 276. *Braythwaite v. Hitchcock*, 10 M. & W. 497.

(z) *Bishop v. Howard*, 3 D. & R. 297; 2 B. & C. 100, s.c. *Hutton v. Warren*, 1 M. & W. 476; 2 Gale, 71, s.c. *Torriano v. Young*, 6 C. & P. 12.

(a) *Doe v. Watts*, 7 T. R. 85. *Doe v. Morn*, 1 B. & Ad. 369.

yearly." (b) A demise by a tenant from year to year to another also to hold from year to year, is in contemplation of law a demise from year to year during the continuance of the original demise to the intermediate landlord, and is properly so described in pleading. (c)

If an annual rent is reserved, the holding is from year to year, although the contract of demise provides that the tenant shall quit at a quarter's notice. Such a contract differs only from the usual letting from year to year in the agreement by the parties to reduce the ordinary six months' notice to quit to three months. It does not mean that the tenant shall quit at any time on receiving three months' notice to quit, but that either party shall be at liberty to determine the tenancy on giving notice to the other, three instead of six months before the expiration of the current year of hiring. But if it is expressly agreed that the tenant is always to be subject to quit at three months' notice given him at any time, and the rent is payable quarterly or monthly, this constitutes a quarterly tenancy, and the lessee will be presumed to hold from three months to three months from the time that he entered as tenant, and the tenancy therefore may be determined by a three months' notice to quit expiring at the end of any quarter from the time of his entry. (d)

It is entirely repugnant to the notion of a tenancy from year to year that the option of determining it should rest solely with the tenant. If by the terms of the contract under which the tenant has entered into possession, the lessor is not to determine the lease so long as the tenant pays the rent and faithfully fulfils his part of the contract, the lease would operate as an estate for life, which can only be created, as we have before seen, by deed, and could not enure as a lease from year to year. "The notion of a tenancy from year to year, the lessor binding himself not to give notice to quit has long been exploded." (e)

A tenancy from year to year recommences every year, (f) and may, in pleading, be stated to commence from the commencement of the last year, or from the time of the original entry. (g)

Quarterly, monthly, and weekly hirings.—When the produce, profits, or advantages of the subject matter of the demise are not reaped annually, but accrue from day to day, as in the case of leases of houses and apartments, the hiring will be a yearly, quarterly, monthly, or weekly hiring,

(b) *Tenterden, C. J. Saunders v. Musgrave*, 6 B. & C. 524; 9 D. & R. 533, n. c.; *Parke, B.*, 5 M. & W. 16.

(c) *Pike v. Eyre*, 9 B. & C. 909; 4 M. & R. 661.

(d) *Kemp v. Derrett*, 3 Camp. 510.

(e) *Lawrence, J.*, and per Lord Ellenborough, *C. J. Doe v. Browne*, 8 East, 167.

(f) *Tomkins v. Lawrence*, 8 C. & P. 731.

(g) *Doe v. Dobell*, 1 G. & Dav. 218.

according to the circumstances of each particular case, and the custom of the country where the property is situate. (h) In the case of a demise of an unfurnished mansion at an annual rent, payable half-yearly or quarterly, the hiring is a hiring from year to year. In the case of cottages or unfurnished apartments in a house demised generally at a monthly or weekly rent, the presumption is in favour of a monthly or a weekly tenancy. (i)

A wharf, warehouse, and buildings, were let to a tenant at a rent of 375*l.* a quarter, on the terms that a quarter's rent should be paid down on the day of the commencement of the tenancy, and should be continued to be paid in advance during the continuance of the hiring, and it was held that this was a quarterly and not a yearly hiring. (k)

Tenancy at will.—"Tenant at will," saith Littleton, "is where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called the tenant at will, because he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him. If the lessor reserves to himself a right of re-entry at his own will and pleasure, or the lease contains an express stipulation to the effect that the tenancy may be put an end to at the will of either party, the courts are of course bound to give effect to such declared intention, and construe the holding as a tenancy at will. (l) If a tenant for years holds over after the expiration of his lease, or continues in possession pending a treaty for a further lease, (m) or is admitted into possession pending a treaty for a purchase, (n) he is strictly a tenant at the will of the landlord, and may be turned out of possession without notice to quit; but if during the continuance of such tenancy at will, the tenant has offered and the landlord has accepted rent for the use of the property during such tenancy, an implied contract for a letting and hiring from year to year immediately arises between them. (o)

A minister of a dissenting congregation placed in the possession of a chapel and dwelling house, by trustees, in whom the property is vested,

(h) *Richards v. Langridge*, 4 Taunt. 128.
Doe d. Hull v. Wood, 15 Law. J. n. s. (Exch. 41.)

(i) Post. s. 2.

(k) *Wilkinson v. Hall*, 4 Sc. 301.

(l) *Richards v. Langridge*, 4 Taunt. 131.
Cudliffe v. Rundal, 4 Mod. 12; 3 Salk. 166, s. c.

(m) Com. Dig. tit. Estates (H. 1.) *Doe v. Miller*, 5 C. & P. 595. *Doe v. Stennet*, 2 Esp. 717. *Peacock v. Peacock*, 16 Ves. 57. *Doe v.*

Pullen, 3 Sc. 276; 2 Bing. n. c. 508, s. c.

(n) *Doe v. Jackson* 2 D. & R. 523; 1 B. & C. 448. *Doe v. Chamberlaine*, 5 M. & W. 16. *Doe v. Boulton*, 6 M. & S. 148. *Right v. Beard*, 13 East, 210.

(o) *Clayton v. Blakey*, 8 T. R. 3. *Doe v. Watts*, 7 T. R. 83. The receipt of calm also, as rent, creates a tenancy from year to year. *Doe v. Morris*, 1 B. & Ad. 369.

in trust to permit the chapel and dwelling-house to be used for the purpose of religious worship, is a mere tenant at will to those trustees, and his tenancy is determined instantaneously by a demand of possession. (*p*)

A tenant at will is entitled to retain possession of the land he holds until the lessor has made a demand of possession, (*q*) or has intimated, either by express words or by his conduct and actions, his determination to put an end to the tenancy. The holding may be determined at any time by the declaration of the parties; such as a letter from the attorney of a lessor to the attorney of a tenant at will, stating that unless the tenant paid the lessor what he owed him, he would, without delay, take measures for recovering possession of the property occupied by such tenant, (*r*) or a demand of possession on the part of the landlord; or by his entry on the land without the tenant's consent, and exercising acts of ownership; also by his alienation of the reversion; by the tenant's quitting the premises; by the death of either of the parties; and, in short, by the doing of any act which amounts to a determination of the will on either side. (*s*) If the will be determined, and the landlord's consent to the occupation be withdrawn, so as to create an adverse possession, and the landlord afterwards does any act fairly leading to the presumption that he has renewed his consent to the holding, a fresh tenancy at will is created between the parties. (*t*)

Tenancy by sufferance.—*Adverse tenancy and possession.*—When the landlord has demanded possession, or has done any act which is tantamount to a determination of the will, or the tenant holds over at the expiration of a lease against the will of the lord, or after the expiration of a notice to quit, he is said to be a tenant at sufferance in contradistinction to a tenant at will. (*u*) The expression, however, is not calculated to give a very correct idea of the nature of the holding, and does not seem to have been very happily chosen. Although termed tenant by sufferance, he is understood to hold wrongfully and against the will, and contrary to the permission of the landlord. He has, consequently, no estate or interest at all in the land, and an action of ejectment may at any time be brought against him without notice and de-

(*p*) *Doe v. M'Kag*, 10 B. & C. 721; 5 M. & B. 620, s. c. *Doe v. Jones*, ib. 718, 616, 752. *Revett v. Chapman*, 2 M. & P. 12; 5 Bing. 7, s. c.

(*q*) *Right v. Beard*, 13 East, 210. *Doe v. Miller*, 5 C. & P. 595. *Roe v. Street*, 4 N. & M. 42.

(*r*) *Doe v. Price*, 2 M. & Sc. 464; 9 Bing. 355, s. c.

(*s*) *Doe v. Brett*, Hurl. & Walm. 8. *Ball v. Cullimore*, 2 C. M. & R. 120; 1 Gale, 96, s. c.; 1 Tyr. 753, s. c.

(*t*) *Doe v. Turner*, 7 M. & W. 232. *Turner v. Doe*, 9 M. & W. 644.

(*u*) Co. Litt. 57, b. *Simkin v. Ashurst*, 1 C. M. & R. 261. *Doe v. Turner*, 7 M. & W. 226, 234.

mand of possession ; and if the lord can get possession peaceably, he is entitled to take and retain possession, and so oust the wrong doer. (x) The difference, therefore, between a tenancy at will and what is called a tenancy by sufferance, is that in the one case the tenant holds by right and has an estate or term in the land, precarious though it be, and the relationship of lessor and lessee subsists between the parties ; in the other, the tenant holds wrongfully and against the will and permission of the lord, and has no estate at all in the occupied premises. If a lessee for a term of years has incurred a forfeiture of his term, but continues in possession, notwithstanding such forfeiture, he is *prima facie* tenant at sufferance, and may be ejected without any formal demand of possession ; (y) but if the lessor neglects for any lengthened period to take advantage of the forfeiture, and does any act implying an acquiescence in the tenant's continuance of possession, the tenancy by sufferance or adverse tenancy forthwith becomes a tenancy at will ; and if the lessor accepts rent which has accrued due subsequently to the forfeiture, this amounts to a waiver of the forfeiture, and the tenant is restored to the benefits and advantages of his lease.

Whenever a man has been let into possession of realty by the owner or lord of the soil, or has entered and taken possession with the authority and by the consent of the latter, he is a tenant at will, and not a tenant by sufferance, and the implied consent and permission of the lord is presumed to continue until some act has been done manifesting that the consent has been withdrawn, and that the occupier holds possession as a wrongdoer in spite of the lord. (z) So long as the occupier holds with the express or tacit permission of the owner, the Statute of Limitations (3 & 4 W. 4, c. 27,) does not run against him ; but if the possession is an adverse possession ; if the occupier holds wrongfully against the consent of the owner, and such adverse possession continues twenty years, the owner loses his right to the property, and the occupier cannot then be disturbed. (a) " If a cottage is built in defiance of the lord, and quiet possession has been had of it for twenty years, it is within the statute ; but if it were built at first by the lord's permission, or any acknowledgment has been since made, (though it were a hundred years since,) the statute will not run against the lord, for the possession of a tenant at will for ever so many years is no disseisin ; there must be a tortious ouster,

(x) *Wildor v. Rainforth*, 8 B. & C. 4. *Fox v. Oakley*, Peake's Ad. Cas. 214. *Doe v. Quigley*, 2 Campb. 504.

(y) *Doe v. Sawder*, 1 Stark. 308.

(z) Co. Litt. s. 70. *Doe v. Edgar*, 2 Sc. 736 ; 2 Bing. N.C. 498, s. c.

(a) *Ib.* 752, 391.

and it is not to be presumed that a country fellow should build in opposition to the lord, unless it be shown or conveyances are produced." (b) And although the will of the owner, or the landlord, or lord of the soil may have been determined, and his consent withdrawn at one period, so as to render the possession an adverse possession, any subsequent acquiescence in the occupation will at once put an end to the adverse possession, as previously mentioned, and create a fresh tenancy at will.

Defeasible leases.—If a lease is made defeasible at the option of either of the parties, it may be determined by the lessor by a simple demand of possession, or the tenant may quit the demised premises and release himself from his contract by tendering possession to the landlord; but if the lease is made determinable at the expiration of three, six, or nine years, or any particular interval of time, reasonable notice of the intention to determine the contract must be given by the party who intends to avail himself of the power of defeasance. (c) If an agreement be entered into for a yearly tenancy, with a proviso for determining it in the middle of the year, such a proviso does not prevent it from being a yearly tenancy. When the party is *in*, he is *in* of the whole estate for a year liable to a defeasance on a particular event. So where there is a lease for twenty-one years, determinable at the end of seven or fourteen years, the party when he enters is *in* of a term of twenty-one years, but a defeasible term, and which may terminate by matter *ex post facto*. (d)

A lease was granted of certain premises to be holden for twenty-one years from Michaelmas 1823, at an annual rent payable quarterly, and the lessor covenanted, that if the tenant should be desirous of determining the tenancy at the end of the first seven or fourteen years, and should give six calendar months' notice immediately preceding the expiration of the first seven or fourteen years, the demise should determine;" and the tenant, on the 1st of November, 1836, at the commencement of the fourteenth year, being desirous of determining the lease, gave notice to the lessor that he should quit and deliver up the demised premises on the 24th day of June, 1837, agreeably to the covenants of the lease subsisting between us, dated, &c.;" it was held that the notice was bad, because it did not strictly conform with the requirements of the covenants. The term of fourteen years ended at Michaelmas, and not on Midsummer-day, (the 24th of June,) 1837, and the notice consequently not having been given six calendar months "*immediately preceding* the expiration

(b) Bull, N. P. 104. *Doe v. Wilkinson*, 5 D. & R. 275; 3 B. & C. 414, s. c.
(c) *Goodright v. Richardson*, 3 T. R. 462;

Alderson, B., 6 M. & W. 108.
(d) *Rex v. Hermonceaux*, 7 B. & C. 555.

of the first fourteen years," was not a strict accomplishment of the condition! (e)

Disclaimer and forfeiture.—If a tenant from year to year disclaims the title of his lessor; if he claims the land as his own, and refuses to pay rent on the ground that he is himself the owner, or if he attorns to a stranger or professes to sell or grant the property to another; if he cuts down timber, pulls down or alters dwelling-houses, or obliterates fences, boundaries, and land-marks, or opens and digs mines and quarries against the will of the lord, the latter has a right of re-entry upon the property, and may forthwith bring an action of ejectment to recover possession of the demised premises. Acts of this description, on the part of a tenant, from year to year, work a forfeiture of his term and interest, and convert the possession into an adverse possession, so that the tenant may at once be proceeded against in an action of ejectment without any notice to quit, and without any demand of possession. (f) But if the lessor dies, and adverse claimants to the property appear and demand the rent of the tenant, and the latter refuses to pay it until the conflicting claims have been ascertained and settled, the refusal is not such a disclaimer of the title of the real owner as will justify the latter in treating the tenant as a trespasser. (g) "To constitute a disclaimer (by words) there must be a renunciation by the party of his character of tenant, either by setting up the title of a rival claimant or by asserting a claim of ownership in himself." (h) A mere refusal to pay rent, (i) or a declaration by the tenant that he will continue to hold possession, or an omission to acknowledge the landlord as such by requesting further information as to title when the property has changed hands, does not render the tenancy an adverse tenancy and possession. (k) All verbal disclaimers operating as a forfeiture of the tenant's interest in, and right of possession of, the demised premises, and dispensing with the necessity of a notice to quit, are restricted to tenancies from year to year. A lease for a definite term of years cannot be forfeited by mere words." (l) And if, after a disclaimer by tenant from year to year, the landlord puts in a distress for rent, such distress is a waiver of the disclaimer, and again clothes the tenant with a lawful possession. (m)

(e) *Cadby v. Martinez*, 11 Ad. & E. 720.

(f) *Doe v. Whittick*, Gow. 195. *Doe d. Calvert v. Frowd*, 1 M. & P. 480; 4 Bing. 557, n. c. *Doe v. Grubb*, 10 B. & C. 816; 5 M. & R. 666; Bull. N. P. 96. *Doe d. Whitehead v. Pittman*, 2 N. & M. 673. *Doe d. Bennett v. Long*, 9 C. & P. 773. *Doe d. Davies v. Evans*, 9 M. & W. 50.

(g) *Doe v. Pasquali*, 1 Peake, 259.

(h) *Tindal, C. J.*, *Doe d. Williams v. Cooper*,

1 Sc. N. R. 39, 40.

(i) *Doe d. Dillon v. Parker*, Gow. 180.

(k) *Doe d. Lewis v. Cawdor*, 1 C. M. & R. 398. *Doe d. Gray v. Stanion*, 1 M. & W. 703. *Doe d. Williams v. Cooper*, 1 Sc. N. R. 41.

(l) *Doe d. Graves v. Wells*, 10 Ad. & E. 436. *Doe d. Ellerbrock v. Flynn*, 1 C. M. & R. 137.

(m) *Doe d. David v. Williams*, 7 C. & P. 322.

"*Forfeiture* is also incurred by the breach of express or conventional conditions; for the lessor, having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they are not illegal nor repugnant to the grant itself, and upon the breach of those conditions may avoid the lease.⁽ⁿ⁾ It is frequently made a term or condition of the demise, that the lease shall be forfeited and the lessor have a right to re-enter and repossess himself of the demised premises for a breach of particular covenants contained in a lease,—for non-payment of rent,—for not repairing,—for waste,—for not insuring,—for assigning or underletting without the license and permission of the lessor, and for carrying on certain trades prohibited and forbidden by the express terms of the contract of demise.^(o) The law does not favour forfeitures of estates, and strict proof of a breach of a condition or covenant working a forfeiture of a lease is always required.^(p)

The stat. 4 G. 2, c. 28, dispenses with the necessity of a formal demand or re-entry in cases of forfeiture for non-payment of rent, and provides a simple form of proceeding in ejectment for the recovery of the possession of the demised premises, when no sufficient distress is to be found thereon. If judgment is suffered to be recovered in such action of ejectment, and execution to be issued without payment of the rent and arrears, together with full costs, and without any bill being filed for relief in equity, within six calendar months after such execution, the landlord or lessor from thenceforth holds the demised premises discharged from the lease, (provided, of course, such judgment in ejectment is not erroneous, and has not been reversed by writ of error.) The object of the statute was "to remove the inconveniences to landlords from the niceties attending re-entries at common law, and from the obtaining injunctions in equity." The act does not extend to cases where the right to re-enter is not absolute, and where the lease is not absolutely forfeited at common law by the re-entry of the lessor,^(q) nor to cases where there is a sufficient distress upon the demised premises.^(r)

Waiver of a forfeiture.—"Acceptance of rent will be considered as a waiver of the forfeiture, if it appear that at the time the lessor received the rent he had notice of the breach of the condition."^(s) A waiver of one forfeiture does not, of course, prevent the lessor from availing himself of subsequent forfeitures.^(t)

(n) Bac. Abr. Leases, T. 2.

(o) Woodfall, 237—250. Archbold, 94—104.

(p) 1 Wms. Saund. 287 b., 288 i.; 1 Mad. ch. 36.

(q) *Doe d Parke v. Borditch*, 15 Law J. n. s. Q. B. 266.

(r) *Doe v. Wandlass*, 7 T. R. 117.

(s) Bac. Abr. Leases, T. 2.

(t) *Doe v. Bliss*, 4 Taunt, 735.

SURRENDERS *of LEASES by OPERATION of LAW* take place where the lessee does some act, or is a party to the doing of some act of notoriety totally inconsistent with the continuance of his lease, and which would be an invalid act if the lease continued to exist. Thus, if a lessee for years accepts a new lease from his lessor, the acceptance of such new lease is of itself a surrender of the former lease.^(u) But a mere agreement for an increased rent will not have the effect of creating a new tenancy.^(x) Acts amounting to a surrender "are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like. Whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed."^(y)

When there is an open and notorious shifting of the actual possession of corporeal property in execution of an agreement between the lessor and lessee and a third party, to substitute such third party as the lessee in the place of the original lessee, there is a surrender by operation of law of the original lease.^(z) But a mere agreement for the substitution of a new tenant not followed up by any actual change of possession, or a mere change of possession unaccompanied by an agreement of substitution, does not amount to a surrender.^(a) It must be shown that the incoming tenant has been expressly received and accepted by the landlord as his lessee, in the place and stead of the original lessee^(b) for the mere change of possession, is, of course, no evidence of the grant and acceptance of a new lease, the *prima facie* presumption being that the incoming tenant has entered and taken possession as the undertenant or assignee of the original lessee.^(c)

A lessee for a term of seven years of a house, cottages, stable, and yard becoming embarrassed in his circumstances, abandoned the possession of the demised premises, and underlet them to various tenants. The landlord received the rent from these tenants, he relet the cottages as they became vacant, and at last advertised the whole property "to be let or sold," and it was held that these public acts of ownership exercised by the landlord,

^(u) *Mayor, &c., of Thetford v. Tyler*, 15 Law J., N. S. (Q. B.) 33. *Doe v. Forwood*, 3 Ad. & E. N. S. 638.

^(z) *Geeckie v. Monk*, 1 C. & K. 307. *Berrey v. Lindley*, 4 Sc. N. R. 61.

^(y) *Parke, B., Lyon v. Reed*, 13 M. & W. 309; Co. Litt. 352.

^(a) *Doe v. Williams*, 9 D. & R. 30; 6 B. & C. 41, s. c. *Mathews v. Savell*, 2 Moore, 262; 8 Taunt. 270, s. c.

^(b) *Taylor v. Chapman*, Peake's Add. cas 19.

^(c) *Graham v. Whithelo*, 1 Cr. & M. 194.

^(c) *Doe v. Williams*, 9 D. & R. 30; 6 B. & C. 41, s. c.

and assented to by the original lessee, amounted to a surrender of the term by operation of law.(d)

A tenant from year to year quitted the demised premises at the end of the first quarter, and about three weeks afterwards the lessor demised them to another person at a less rent, and sued the original lessee for the difference, and it was held that the landlord could not have two tenants, and be receiving rent from one, and at the same time holding the other liable, and that as he had relet the premises, and so prevented the original lessee from returning and occupying them if he had thought fit, he had discharged him from all liability as his tenant. "If the plaintiff," (the lessor,) observes Gaselee, J., "had given the defendant notice that if he would not occupy the apartments himself, he would let them to another tenant, on his account, the case would have been different."(e)

A lessee, whose lease expired at Lady Day, quitted the possession of the demised premises on the succeeding Lady Day, having settled with his landlord for a quarter's rent up to that day, and a new occupier was let into possession, who paid rent to the landlord's agent for four successive quarter days, the original lessee residing all the while at another place in the knowledge of the plaintiff, who never made any application to him for the rent for nearly two years, although several quarters rent were due, and it was held that these facts were sufficient to warrant the jury in finding that there had been a substitution of the new tenant as the lessee in the place of the original lessee, and a consequent surrender of the original lease.(f)

Cook being tenant from year to year of a house, underlet to one Perks, from Christmas, 1816, and at Lady, 1817, he distrained upon Perks for rent. The landlord having then a claim upon Cook for rent, gave notice to Perks not to pay his rent to Cook, took Perks' bill in payment of the rent due to himself from Cook, at the same time declaring that he would have nothing more to do with Cook, and he afterwards distrained upon Perks for rent then in arrear, and it was left to the jury to say whether, under these circumstances, the plaintiff had not with the assent of Cook accepted Perks as his tenant, and the jury having found that fact in the affirmative, it was held that there was a valid surrender of Cook's interest in the premises by act and operation of law.(g)

But the mere circumstance of a landlord's having accepted rent from an

(d) *Reeve v. Bird*, 1 C. M. & R. 31; 4 Tyr. 612, s. c.

(e) *Wales v. Atcheson*, 11 Moore, 380, 381.

(f) *Woodcock v. Nuth*, 1 M. & Sc. 321; 8

Bing. 170, s. c.

(g) *Thomas v. Cook*, 2 B. & Ald. 120, 121.

Johnstone v. Huddlesone, 7 D. & R. 419; 4 B. & C. 922; M'Clel. & Y. 141, s. c.

assignee or under-tenant in the possession of the demised premises, does not of itself amount to an acceptance of such assignee or under-tenant as his lessee in the place of the original lessee, the *prima facie* presumption being that the rent was paid by the latter as the agent of the original lessee and in his behalf. *(h)* A tenant from year to year of a dwelling-house and shop, died in August, 1842, and his widow, after his decease, continued in the occupation of the demised premises, paying the rent to the landlord as it became due. On the 15th of March, 1844, letters of administration of the deceased husband's estate were granted to the father of the latter, and in the October following the widow married again. In February, 1845, four months after the second marriage, the administrator demanded possession of the demised premises, and brought an action of ejectment for the recovery thereof, and it was held that the payment of the rent by the widow to the landlord, and his acceptance thereof, with the knowledge of the administrator who never objected to such payment, or made any demand for the rent, did not amount to a surrender of the term and interest of the deceased husband, and a grant of a fresh lease to his widow, but that the rent must be presumed to have been paid by her as the agent of the administrator, that she was tenant at will to the latter, and might at any time be turned out of possession by him on a simple demand and without any notice to quit. *(i)*

A dispute arose between a yearly tenant and her landlord, and the tenant said to the landlord, "I shall quit," and the latter said "You may do so, and I shall be glad to get rid of you," and the tenant then removed her furniture, and sent the keys of the rooms she occupied to the landlord, and the latter accepted them, and it was held that there was a surrender of the lease by operation of law; also that a surrender to one of two joint lessors may be a surrender to both. *(k)*

If the surrender is not a surrender by act and operation of law, but is sought to be established through the medium of the contract and agreement of the parties, the surrender must, if the lease was made between the first of January and the first of October, 1845, be authenticated by writing under seal. If it was made after the first of October, 1845, for a term exceeding three years, it must likewise be authenticated by deed; but if the term does not exceed three years, a note in writing signed by the surrenderor or his agent will suffice, *(l)* provided it is duly stamped. *(m)*

(h) *Copeland v. Gubbins*, 1 Stark. 96.

(i) *Doe d. Hull v. Wood*, 15 Law J., N. S. (Excheq.) 41.

(k) *Grimman v. Legge*, 8 B. & C. 324. *Dodd v. Achlam* 7 Sc. N. R. 415; 6 M. & Gr. 672, s. c.

(l) 7 and 8 Vict. c. 76; 8 and 9 Vict. c. 106. And see further as to surrenders, ante, 90.

(m) *Doe v. Phillips*, 11 Ad. & B. 796. *Williams v. Sawyer*, 6 Moore, 226; 3 B. & B. 70, s. c.

An agreement to surrender will not operate as an actual surrender, unless it appears to have been the intention of the parties that it should have such an operation and effect. If mutual acts are to be done on either side, the surrender does not take place until they have been accomplished. *(n)* But any absolute unconditional agreement or promise, founded upon a sufficient consideration and properly authenticated, or any unqualified covenant on the part of a lessee to yield and deliver up the demised premises to the lessor, intended to have an immediate effect, will operate as a surrender of the term. *(o)* If a lessee re-demises his whole term to the lessor with a reservation of rent, such re-demise operates as a surrender of the original lease. *(p)*

An insufficient notice to quit given by a tenant to the landlord, and accepted by the latter as a good notice, may operate as a surrender of a lease for a term under three years, if the acceptance is authenticated by writing, signed by the landlord or his agent, *(q)* or by the landlord's signature indorsed upon the notice. *(r)*

Notice to quit when necessary.—"When a lease is determinable on a certain event, or at a particular period, no notice to quit is necessary because both parties are equally apprized of the determination of the term. *(s)* If, therefore, a lease be granted for a term of years, or for one year only, no notice to quit is necessary at the end of the term. *(t)*

If a man holds under an agreement for a lease for the full term for which the lease was to have been granted, an ejectment may be brought against him at the expiration of such term without any notice to quit. *(u)*

Certain apartments were let to a tenant "to hold from Christmas day 1808, for twelve months certain, and six months' notice afterwards." After half a year's occupation, the tenant gave notice that he should quit at the following Christmas, and it was held that this was not a two years' holding, but that the defendant was only bound to remain twelve months certain, and that he was at liberty to quit at the end of that period by giving six months' previous notice. *(x)*

In the case of a tenancy at will no notice to quit is necessary, but there

(n) *Coupland v. Maynard*, 12 East, 140.
Weddall v. Capes, 1 M. & W. 51.

(o) *Smith v. Mapleback*, 1 T. R. 441.

(p) *Loyd v. Langford*, 2 Mod. 174.

(q) *Johnstone v. Huddleston*, 7 D. & R. 419;
4 B. & C. 922, s. c. *Doe d. Murrell v. Milward*,
3 M. & W. 332, overruling *Shirley v. Newman*,
1 Esp. 265.

(r) *Harding v. Cuthorne*, 1 Esp. 58.

(s) Lord Mansfield, C. J., *Right v. Darby*, 1
T. R. 162, ib. 54. *Doe v. Lawder*, 1 Stark, 308.

(t) *Cobb v. Stokes*, 8 East, 358.

(u) *Doe v. Stratton*, 1 M. & P. 187; 4 Bing.
446, s. c.; 3 C. & P. 164, s. c.

(x) *Thompson v. Maberly*, 2 Campb. 572.

must be a formal demand of possession, or notice of the determination of the will on the part of the landlord, before any action of ejectment can be brought. (y) The tenant at will, too, in order to discharge himself from his liability for rent, or for a reasonable compensation for the use and enjoyment of the demised premises, must give notice to the landlord of the fact of his abandonment of the possession, and of his election to rescind the contract and put an end to the tenancy. If the occupation is the occupation of a servant or agent holding possession of the premises on account and on behalf of his master or principal, no notice to quit is necessary to be given by the latter, (z) but if after a demand and refusal of possession, the servant or agent continues to occupy, he may be treated as a trespasser and wrong doer. If the occupation is by virtue of a commodatum or loan of the house, or land, as an act of charity or benevolence, the possession of the occupier is the possession of the owner himself, and the latter may at any time remove the tenant, and resume possession of the property without any notice to quit. (a)

If the tenancy is an adverse tenancy and possession, if the occupier holds over after the expiration of a lease, or after a forfeiture, or after an agreement for a lease, or a contract of sale, has gone off, and been abandoned, and continues in possession without the permission and against the will of the owner, no notice to quit nor demand of possession is necessary; (b) but the owner may at once proceed against the wrong doer by action of ejectment for the recovery of the possession of the demised premises, or he may enter and take possession if the tenant abandons the possession and leaves the demised premises vacant. (c) But the landlord is not justified in taking forcible possession with a strong hand, and ejecting the tenant on his own responsibility, without any appeal to a court of justice, and without the aid of the officers of the law. (d)

If the lessee has accepted a lease from a party who had no title to grant the lease, his tenancy is an adverse tenancy, and possession as against the lawful owner, and he may at once be proceeded against by the latter in an action of ejectment, and turned out of possession without any previous notice to quit. If, for example, the lessor himself was only

(y) *Right v. Beard*, 13 East, 210. *Doe v. Stennett*, 2 Esp. 717. *Denn v. Rawlins*, 10 East, 261.

(z) *Doe v. Derry*, 9 C. & P. 494.

(a) *Wildbor v. Rainforth*, 8 B. & C. 6; 2 M. & R. 185, s. c. *Fox v. Oakley*, Peake's Ad. ca. 214. *Doe v. Derry*, 9 C. & P. 494.

(b) *Doe v. Quigley*, 2 Campb. 504. *Doe v. Lawder*, 1 Stark, 308. *Doe v. Sayer*, 3 Campb.

8. *Doe v. Miles*, 1 Stark. 181. *Doe v. Black*, 8 C. & P. 464. *Doe v. Creed*, 2 M. & P. 648.

(c) *Wildbor v. Rainforth*, 8 B. & C. 6; 2 M. & R. 185, s. c. *Fox v. Oakley*, Peake's Ad. Ca. 216. *Turner v. Meymott*, 7 Moore, 574. Kenyon, C. J., 3 T. R. 295.

(d) *Hilary v. Gay*, 6 C. & P. 284. *Taunton v. Costar*, 7 T. R. 432. *Newton v. Harland*, 1 Sc. N. R. 474.

tenant at will at the time of the making of the lease, or had made a prior lease of the lands, or had mortgaged them so as to give the mortgagee a right of entry, and deprive himself of the power of granting a lease for the term specified, the tenant may be turned out by an action of ejectment without any previous notice to quit from the party who has title. (e) But if the lessor at the time of the making of the lease was the absolute owner of the property, and had full right and title to grant the demised premises to the lessee for the term, any subsequent grant, mortgage, sale, or lease, cannot affect the tenant's right of possession, or in any way dispense with the ordinary notice to quit. A subsequent grantee, mortgagee, or lessee cannot of course stand in any better position than the party from whom he takes. (f)

We have already seen, also, that if the lease be for one year certain, and no longer, no notice to quit is necessary, as each party is apprized of the determination of the term; but if the holding is a general holding for a year, and onwards from year to year so long as both parties please, a half year's notice must be given on either side in order to determine the yearly hiring and tenancy. "If there be a lease for a year, and by consent of both parties the tenant continues in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement which was to hold for a year. But then it is necessary for the sake of convenience, that if either party should be inclined to change his mind he should give the other half a year's notice before the expiration of the next or any following year. (g) The length of the notice required to be given depends however upon custom and usage, and it appears that by the custom of the city of London, three months' notice is sufficient in the case of a demise of a house at an annual rent under 40*s.* and half a year's notice when the rent exceeds that amount." (h)

NOTICES to QUIT.—A notice to quit may be given orally by the lessor, or by his agent, (i) unless there has been an express agreement or stipulation for a notice in writing. (k) A mere receiver of rents has no implied authority to give a notice to quit, (l) but an agent or receiver who is entrusted with the general management of landed property, and has a general authority to let lands from year to year, has also authority to de-

(e) *Keech v. Hall*, Doug. 21. *Thunder v. Belcher*, 3 East, 451.

(f) *Birch v. Wright*, 1 T. R. 381.

(g) Lord Mansfield, C. J. *Right v. Darby*, 1 T. R. 162. *Gulliver v. Burr*, 1 W. Bl. 596.

(h) *Tyley v. Seed*, Skin. 649.

(i) *Timmins v. Rowlinson*, 3 Bur. 1603. *Doe v. Crick*, 5 Esp. 196. *Roe v. Pierce*, 2 Campb. 96.

(k) *Legg v. Benion*, Willes, 43.

(l) Parke, J., 10 B. & C. 633. *Doe v. Goldwin*, 2 Ad. & E. n. s. 146.

termine such tenancies by a notice to quit.(*m*) The steward of a corporation who is intrusted with the letting of the corporate estates may give a notice to quit, and needs no authority under seal from the corporation for the purpose. (*n*)

If there are several joint lessors, or joint owners of the property, a notice to quit given or signed by one or more of them, on behalf of all, is sufficient, (*o*) and the subsequent assent of such joint owners to a notice previously given by one or more of them on behalf of all, is equivalent to a precedent authority. (*p*) But if it is expressly provided by the agreement of the parties that a written notice shall be given by all of them, under their respective hands, the notice must be signed by all, and a ratification given afterwards will not do in such a case. (*q*) The notice may also be given by an agent in their behalf, but such notice, in order to be valid and effectual, must be given in the name of the joint owners, the principals, (*r*) and not in the name of the agent; and the agent ought to have authority to give the notice at the time it begins to operate. A subsequent assent and recognition of the act of the agent might, indeed, be equivalent to a previous authority, if it can be proved to have been given prior to the proceedings in ejectment, or at all events, before the day of the demise laid in the declaration. (*s*)

If one or more of several joint owners dissent from the notice, such of them as have joined in giving the notice to quit, are entitled to enter into and hold possession of the demised premises, and receive the rents and profits of the land jointly with the tenant, or lessee, of the others who have refused to join in such notice. (*t*)

If the notice is in writing, and not served personally upon the lessee, but is delivered to a servant, or agent, or assignee of the lessee in the occupation of the demised premises, it should be addressed to the lessee; if it is a notice to the occupier in his own name, it is not a notice to the lessee, and the latter, consequently, is not bound by it. (*u*) If two or more persons hold possession of the demised premises, as joint tenants, or

(*m*) *Doe v. Read*, 12 East, 57. *Doe v. Mizem*, 2 M. & Rob. 56.

(*n*) *Roe v. Pierce*, 2 Campb. 96.

(*o*) *Doe v. Hulme*, 2 M. & B. 433. *Doe v. Summerset*, 1 B. & Ad. 135. *Doe v. Hughes*, 7 M. & W. 139. *Aford v. Vickery*, 1 Car. & M. 280. *Doe v. Read*, 12 East, 57. *Doe d. Kendersley v. Hughes*, 7 M. & W. 141, 142.

(*p*) *Abbott, C. J.*, 3 B. & Ald. 692.

(*q*) *Right v. Cuthell*, 5 East, 497; 5 Rep. 149, s. c.

(*r*) *Denman, C. J.*, 1 G. & D. 467; 2 Ad. & E. n. s. 146. *Pleasant d. Hayton v. Benson*, 14 East, 234.

(*s*) *Goodtitle v. Woodward*, 3 B. & Ald. 689, 691. *Doe v. Walters*, 10 B. & C. 626; 5 M. & B. 357. *Doe v. Goldwin*, 1 G. & Dav. 467; 2 Ad. & E. n. s. 146.

(*t*) *Doe v. Chaplin*, 3 Taunt. 120; 3 M. & W. 340.

(*u*) *Doe d. Carlisle v. Woodman*, 8 East, 223.

tenants in common, notice to one of them is a sufficient notice to all to determine the tenancy. (x)

Description of the premises.—A notice to quit “all the property you hold of me,” addressed to the tenant, is a sufficient description of the demised premises, and any general description applicable to the whole of the property will suffice. (y) But a tenant cannot give a notice to quit which is intended to apply to a part only of premises which have been demised together at one entire rent. (z) A mere misdescription, however, of the premises comprised in the notice to quit, or a mistake in the christian name of the tenant to whom such notice is addressed, does not invalidate the notice, provided the tenant has not been misled or prejudiced by such misdescription or mistake. If he must have known what was meant, he is bound by the notice. (a) Thus, where a notice to quit was delivered to a tenant at Michaelmas, 1795, directing him to quit “at Lady-day, which will be in the year 1795,” it was held that as “Lady-day 1795” had passed at the time of the giving of the notice, it might be rejected as an impossible time, and that as the prospective words of the notice, “Lady-day which will be,” and the conduct of the parties at the time of the serving of the notice manifestly showed that the notice was intended and understood to apply to the Lady-day then next ensuing, the notice must be taken to be a good notice to quit on Lady-day, 1796. (b) So, where a notice was given to quit, “at the expiration of half a year from the delivery of this notice, or at such other time as your *present* year’s holding shall expire, after the expiration of half a year from the delivery of this notice,” and the notice was given towards the close of the current year, it was held that the word “*present*,” which rendered the notice inaccurate and unmeaning, might be rejected, as there was no danger of the tenant having been misled by it. (c)

If the notice is not a peremptory notice to quit, but is drawn up in the alternative, and seems to have been intended either to put an end to the lease or to obtain an increased rent, the tenant may elect to remain in possession, paying an increased rent, and such an option having been accorded to him, he cannot, if he chooses to occupy, be treated as a

(x) *Doe v. Crick*, 5 Esp. 196. *Doe v. Watkins*, 7 East, 553.

(y) *Doe d. Matthewson v. Wrightman*, 4 Rep.

5. *Doe d. Morgan v. Church*, 3 Campb. 71.

(z) *Doe d. Rodd v. Archer*, 14 East, 245.

(a) *Doe d. Cox v. —*, 4 Esp. 185. *Doe d.*

Armstrong v. Wilkinson, 12 Ad. & E. 743; 4 P. & D. 323, s. c. *Doe v. Spiller*, 6 Esp. 70.

(b) *Doe d. Bedford v. Kighley*, 7 T. R. 63; ante, 151.

(c) *Doe d. Williams v. Smith*, 5 Ad. & E. 352.

trespasser and wrongdoer and turned out of possession. (d) If, however, the notice is a notice to pay double rent, or double the annual value under the statutes imposing penalties on tenants for holding over after a notice to quit, the alternative notice so given will be construed as a peremptory notice to quit, accompanied by a warning to the tenant of the penal consequences of disobedience, and not as an offer on the part of the landlord of a new bargain and a new lease at an increased rent. Thus, where a notice to quit was couched in the following terms,—“ I desire you to quit the possession of, &c., at Lady Day next, or I shall insist upon double rent for the same ;” it was held that this was a peremptory notice upon which an action of ejectment might be sustained, and that the alternative clause was intended merely to inform the tenant of the legal consequence of his holding over, and of the landlord’s determination of enforcing the statute imposing a penalty for such an offence. (e)

Length of time required.—We have already seen that in the case of a tenancy from year to year, six calendar months’ notice to quit is required to be given prior to the expiration of the current year of hiring in order to determine the tenancy between the parties. But whenever the tenancy commences and ends at any of the usual feasts, the customary half year intervening between two half-yearly feasts constitutes a sufficient half year’s notice, although the intermediate time be not exactly six calendar months. Thus, where a notice was given on the 29th of September (Michaelmas Day) “ to quit at the end of six calendar months,” it was holden that the notice was a sufficient notice to determine a holding commencing on 25th of March, (Lady Day,) although three days were wanting to complete the full period of six calendar months. (f) When the tenancy is for a less period than a year, as is frequently the case in contracts for the letting and hiring of cottages and apartments, the length of the notice is in general commensurate with the holding ; if the tenancy is from quarter to quarter, a quarter’s notice is requisite ; if it is a monthly tenancy, a month’s notice is required ; and if the holding is a weekly holding, a week’s notice is sufficient. (g) But the length of time required by law for the notice may be varied by local custom or by the special agreement of the parties.

If the time at which the tenant is to quit is specified in the notice,

(d) Lord Mansfield, Doug. 176.

(e) *Doe d. Matthews v. Jackson*, 1 Doug. 175.
Doe d. Lyster v. Goldwin, 2 Ad. & E., n. s., 144.

(f) Tindal, C. J., *Roe d. Durant v. Doe*, 4

M. & P. 393 ; 6 Bing. 575. *Howard v. Wensley*, 6 Esp. 58 ; 4 Esp. 199.

(g) *Doe d. Parry v. Hazell*, 1 Esp. 94. *Doe d. Peacock v. Raffan*, 6 Esp. 4.

care must be taken to make such time correspond with the termination of the term of hiring; for if the term expires at one period, and the notice is to quit at another, such notice is bad, and the lessor cannot safely act upon it. Thus, in the case of tenancies from year to year, where a half year's notice of the intention to determine the tenancy is required to be given on either side, if the notice is a notice to quit in the middle of the current year, it is not binding, as it is contrary to the implied agreement between the parties. (*h*) "If the year expires at Lady Day, a notice to quit at Michaelmas would not be a good notice;" (*i*) and if the term of hiring commences at New Michaelmas, a notice to quit at *Old* Michaelmas would be invalid. (*k*) If a tenant holds possession of a house as a tenant from year to year, under an agreement to quit at a quarter's notice, the tenant cannot be expelled at the expiration of any quarter that the lessor may choose to select, but the notice must be a quarter's notice to quit at the expiration of the current YEAR. (*l*)

If the hiring be a quarterly, a monthly, or a weekly hiring, the notice must be a notice to quit at the expiration of the current quarter, month, or week; if it breaks into the middle of the quarter, month, or week, it is not a good notice to quit, and no action of ejectment can be founded upon it. If the hiring be by the month, and the rent is made payable weekly, a month's notice to quit at the expiration of the current month must be given, and not a notice expiring at any one of the weeks without reference to the termination of the month. (*m*)

A tenant took possession of a house on the 29th of October under an agreement for a quarterly tenancy, determinable by a three months' notice to quit, and it was held, in the absence of an express agreement regulating the commencement of the term, that it must be taken to commence at the time of the tenant's entering and taking possession of the demised premises, and that the notice, to be valid, must be a notice to quit either on the 29th of January, 29th of April, 29th of July, or 29th of October." (*n*) But the precise time at which the tenant is to quit need not be stated in the notice. The period of the commencement and termination of the term is often unknown at the time that the notice is given, and it is quite sufficient if the notice contains a positive announcement of the intention of the party giving it to determine the tenancy as soon as it is legally

(*h*) *Right v. Darby*, 1 T. R. 162.

(*i*) *Tindal, C. J., Berrey v. Lindley*, 4 Sc. N. R. 72. *Doe v. Milward*, 3 M. & W. 328.

(*k*) *Doe d. Spicer v. Lea*, 11 East, 312.

(*l*) *Doe d. Pücher v. Donovan*, 1 Taunt. 555.

Shirley v. Newman, 1 Esp. 267.

(*m*) *Doe d. Peacock, v. Raffan*, 6 Esp. 4.

(*n*) Per Lord Ellenborough, *Kemp v. Derrett*, 3 Campb. 511.

determinable. A notice, for example, "to quit at the end of the first year of your tenancy, which expires half a year after the date of this notice," would be sufficient, and so also would a notice "to quit at the expiration of the current year of your tenancy," provided such notice was given half a year prior to the expiration of the current year of hiring. (o) Sometimes the notice is given in the alternative, in order to hit one of two periods on which the term is known to end, and it has been held that such a notice is a perfectly good notice, and possesses all the certainty that is reasonably requisite for the information of the tenant. A notice, for example, "to quit on the 25th day of March or the 8th day of April next," is good for either of the periods, provided it has been given or served six calendar months prior to the first-named time, and the term ends on one or other of the days specified. (p) A notice to a weekly tenant whose tenancy commenced on Wednesday to quit on Friday, provided his tenancy commenced on Friday, or otherwise at the end of his tenancy next after one week from the date thereof, was held to be a good notice to determine the tenancy at the expiration of a week from the subsequent Wednesday. (q)

If the notice is made to apply to the current term of hiring, and it is given too near the end of the current term to be a good notice for that term, it will not apply to the next term of holding, as that is not the current term, and a fresh notice to quit, therefore, must be given. Thus, where a notice, dated the 21st of October, 1848, was given to a tenant from year to year to quit "on the 18th day of May next ensuing, or on such other day in the *current* year as the tenancy of the premises you now hold shall expire," and it appeared that the premises were holden at an annual rent, payable at Martinmas and May day, (the 18th of May,) and that the tenancy commenced and ended at Martinmas (the 11th of November); it was held that the notice was bad, as the lessor had no power to determine the tenancy at either of the periods named therein. It was nugatory as regarded the 18th of May, (May day,) inasmuch as that day fell in the middle and not at the end of the year, and it was also inoperative as regarded any "other day in the *current* year," inasmuch as it was given only three weeks before the expiration of the "*current* year," the notice being dated on the 21st of October, and the current year expiring on the 11th of the next month of November. (r)

The notice is always understood to apply to the year in which it is

(o) *Phillips v. Butler*, 2 Esp 589.

(p) *Doe d. Matthewson v. Wrightman*, 4 Esp 6.

(q) *Doe d. Campbell v. Scott*, 4 M. & P. 20.

(r) *Doe d. Mayor of Richmond v. Morphet*, 14 Law J., n. s., Q. B. 345.

given, whether it expressly refers to "the current year" or not, and it will not operate as a notice to quit for the succeeding year, unless it appears plainly to have been the intention of the lessor that the notice, if invalid for the first year, should apply to the next year of the holding.

A tenant from year to year of a house, received a notice, dated "the 17th June, 1840," from the lessor, requiring him "to quit on the 11th of October now next ensuing, or such other day or time as your said tenancy may expire on;" and it appeared that the term commenced and ended on the 11th of October, and the notice therefore was clearly insufficient for the 11th of October then next ensuing, and the lessor sought to apply it to the 11th of October of the following year; it was held that the notice was not a good notice for the last-named period. "If the landlord," observes Pollock, C. B., "had intended the notice to operate as a notice for a subsequent year, he should have given the tenant more distinct information." And says Rolfe, B., "If it had been in these terms, 'I give you notice to quit on the 11th of October now next ensuing,' or if that be not long enough to make this notice good, then at the end of the next year of your tenancy, that would have been sufficient." (s) A notice dated the 27th, and served on the 28th of September, required a tenant to quit "at Lady Day next, or at the end of your current year;" and it appeared that the then current year of hiring ended on Michaelmas Day, (the 29th of September,) two days after the day of the date, and one day after the service of the notice to quit, and it was held that it could not be presumed that the notice was intended to apply to the year in which it was given, and of which two days only remained, but that it must be taken to apply to the next year." (t)

So where the term of hiring commenced and ended on the 2nd of February, and the lessor, on the 22nd of October, 1838, three months and ten days only before the expiration of the year, gave the tenant notice to quit "at the expiration of half a year from the delivery of this notice, or at such other time as your *present* year's holding shall expire, after the expiration of half a year from the delivery of this notice," it was held that the notice, though bad for February, 1834, the succeeding February, was a good notice for February, 1835." (u)

The current year of the tenancy naturally commences and ends in all cases on the commencement of the original holding. And where premises were demised by an agreement, dated "13th August, 1838," for the term

(s) *Mills v. Goff*, 14 M. & W. 75.

(t) *Doe d. Huntingtower v. Culliford*, 4 D. & R. 248.

(u) *Doe d. Williams v. Smith*, 5 Ad. & E. 353.

of "one year *and six months* certain from the day of the date" of such agreement, at the yearly rent of £26, payable quarterly, three calendar months' notice to be given on either side previous to the termination of the said tenancy; and the tenant entered and held possession of the demised premises beyond the year and six months; and on the 7th May, 1840, the lessor gave the tenant notice to quit "on or before the 13th day of August next, or at the expiration of the current year of your tenancy, which shall expire next after the end of three months from and after your being served with this notice," the notice was held to be a good notice to quit on the 13th day of August then next ensuing, as the year of hiring was to be calculated from that day, and not from the termination of the year and six months. (x)

A tenant entered into possession of a dwelling-house and premises at Michaelmas 1823, under an agreement for a lease for a term of five years and a half, at an annual rent of sixty-six guineas. The lease was never granted, but the tenant continued to occupy under the notion that his agreement was as good as an actual lease, and paid his rent of sixty-six guineas regularly at Michaelmas. When the five years and a half were nearly expired, negotiations were entered into for a further lease for seven, fourteen, or twenty-one years, at an increased rent of £84 per annum, such new lease to commence on the expiration of the term of five years and a half for which the premises were then supposed to be holden. This second lease, however, was never executed any more than the first; but the defendant continued in the occupation of the premises, paying the *increased rent* of £84 per annum regularly at Michaelmas, the period at which the original rent of sixty-six guineas had always been paid. On the 11th of March, 1835, eleven years and a half after the original entry, the tenant gave the lessor notice of his intention to quit at the following Michaelmas; and it was held that the notice was a good notice to quit, and that the current year of the tenancy must be calculated from the original entry of the tenant upon the premises, and not from the expiration of the supposed term of five years and a half. (y) If the new lease had actually been executed, and a new tenancy created, commencing at Lady Day 1829, then the case would have been different.

Calculation of the current year from one of the usual feast days.—The term of hiring is generally by the express or implied agreement of the

(x) *Doe d. Robinson v. Dobell*, 1 Ad. & E. n. s. 806; 1 G. & Dav. 218. *Doe d. Castleton v. Samuel*, 5 Esp. 173. *Roe d. Jordan v. Ward*, 1 H. Bl. 96. *Doe d. Collins v. Weller*, 7 T. R.

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(y) *Borrey v. Lindley*, 4 Sc. N. R. 61; 3 M. & Gr. 498, a. c.

parties, calculated from some one or other of the quarterly feasts, either from Lady Day or Michaelmas Day, Midsummer Day or Christmas Day ; and " if the tenant enter in the middle of a customary quarter, and he afterwards pays his rent for that half quarter, and continues then to pay from the commencement of a succeeding quarter, he is not a tenant from the time of his coming in, but from the succeeding quarter day." (z) Thus where a tenant came into possession on the 21st November, and paid rent up to Christmas, and continued afterwards to pay his rent half-yearly at Midsummer and Christmas, it was held that his tenancy must be taken to have commenced at Christmas. (a)

If the notice be given to quit at Michaelmas generally, it is good for either Old or New Michaelmas. *Prima facie* it would be for New Michaelmas ; but if the holding was from Old Michaelmas, this notice would do for that also. (b) A notice was given on the 27th of September, " to quit at the expiration of the term for which you hold ;" and evidence was permitted to be given of a general custom of the country to let from Lady Day, and of the fact of the rent being due at Michaelmas and Lady Day ; and it was left to the jury to presume, in the absence of evidence to the contrary, that the tenancy, like other tenancies in that part of the country, was a tenancy from Lady Day to Lady Day. (c)

It has been holden, that since the existence of the new style sanctioned by act of Parliament, a lease by deed of lands " to be holden from the feast of St. Michael," must be taken to mean New Michaelmas, and that extrinsic evidence is not admissible to show that it meant a holding from Old Michaelmas. (d) But although the oral expressions and agreements of the parties are inadmissible to alter or contradict the written contract, yet all the surrounding circumstances may be regarded ; and if it can be shown that the rent has always been paid at Old Michaelmas, or that by the custom of the country lands are always let at Old Michaelmas, the holding would surely be deemed to be from the latter period. (e) It has been thought that there is a difference between leases by deed and by simple contract, as regards the admission of intrinsic evidence of surrounding circumstances, and of custom and usage, for the purpose of ascertaining the period of the commencement of the term. (f) But the authorities

(a) Per Lord Ellenborough, C. J., 6 Esp. 10. *Doe d. Savage v. Stapleton*, 3 C. & P. 275.

(a) *Doe d. Holcomb v. Johnson*, 6 Esp. 10.

(b) Parke, B., *Doe d. Willis v. Perrin*, 9 C. & P. 468. *Doe d. Hinde v. Vince*, 2 Campb. 256. *Furley v. Wood*, 1 Esp. 197.

(c) *Doe d. Milnes v. Lamb*, Adams Eject.

4th ed. 272.

(d) *Doe d. Spicer v. Lea*, 11 East, 311. *Smith v. Walton*, 1 M. & Sc. 382 ; 8 Bing. 235, s. c.

(e) *Furley v. Wood*, 1 Esp. 198. *Doe d. Hall v. Benson*, 4 B. & Ald. 589. *Den v. Hopkinson*, 3 D. & R. 507.

(f) 4 B. & Ald. 589, 590.

seem to show that no such difference exists, but that the evidence is equally admissible in either case. (g)

It has been said by Lord Kenyon, that if the lessor brings an action of ejectment against the tenant after the expiration of six months' notice to quit, and the lessor "has mistaken the commencement of the defendant's tenancy, so that his notice to quit is for that reason wrong, the onus of proving the true time of the commencement of the term lies on the defendant, who thus seeks to defeat the plaintiff's right to recover." (h) But it has since been holden, that the lessor is bound to give some evidence of the period of the termination of the term, in order to support his notice to quit. The mere service upon the tenant of a notice to quit at a particular time, is not *prima facie* evidence of the termination of the term at the time mentioned in such notice." (i) But if the tenant is expressly told that he must leave after the expiration of six months; or if a written notice is served personally on the lessee, and the latter reads it, and makes no objection to it, this is *prima facie* evidence to go to a jury of the time of the termination of the holding. "Whether the personal service and silence of the tenant amount to an admission, must depend upon circumstances. If he cannot read, or does not read, the notice in the presence of the person who serves it upon him, it must go for nothing." (k)

A notice was given on the 23d of March by a landlord to his tenant, to quit at the expiration of the current year, and a declaration in ejectment, laying the demise on the first of November, was on the 16th of January following served upon the tenant, who then made no objection to the notice to quit, but said he should go out as soon as he could suit himself; this was held to be evidence for the jury of an admission that the tenancy ended at Michaelmas, and had been determined at the right time. (l) But the mere admission by the tenant of a holding corresponding with the time mentioned in the notice, may be at once rebutted by the direct evidence of a different holding, and the mere silence or neglect of the tenant to make an objection to the insufficiency of the notice at the time he receives it, does not amount to a waiver of the defect. Thus where a tenant was served with a notice to quit at Midsummer, and the tenant proved that his tenancy commenced and ended at Michaelmas, it was held that his acceptance of the notice without making an objection to the

(g) Ante, ch 5, 147—164.

(h) *Doe d. Mathewson v. Wrightman*, 4 Esp. 5. Eyre, B., *Doe d. Puddicombe v. Harris*, cited 1 T. R. 161, 162.

(i) Per Lord Ellenborough, *Doe v. Calvert*,

2 Campb. 388.

(k) *Thomas d. Jones v. Thomas*, 2 Campb. 647. *Doe d. Clarges v. Forster*, 13 East, 404.

(l) *Doe d. Baker v. Woombell*, 2 Camp. 559.

time mentioned for his quitting, did not amount to a waiver of the mistake. (m)

If the period of the commencement of the term is uncertain, or is unknown to the lessor, and the latter applies to the lessee to ascertain the extent of his interest, and the time of the commencement of his term, the lessee is bound by the information he gives, and cannot be permitted afterwards to set up a different holding for the purpose of fraudulently defeating proceedings that have been taken by the landlord upon the faith of such statement, and it has been held by Lord Kenyon, that it makes no difference whether the information so given proceeded from mistake or design. (n)

Different periods of entry.—When the demised premises are to be entered upon at different periods, the notice to quit ought to refer to the time of the tenant's entry and holding of the principal subject matter of the demise. Thus if houses and buildings and land are let together, to be entered upon at different times, or holden from different periods, and the houses and buildings constitute the principal subject matter of the demise, and the land is merely accessorial thereto, the notice to quit should refer to the tenant's entry and holding of the houses, and not of the land; and it is a question for the jury which is the principal and which the accessorial subject of demise. (o)

An agreement was entered into for the letting and hiring of a farm; to hold the arable ground from Old Candlemas, the pasture from Old Lady Day, and the meadow from Old May Day, at an annual rent for the whole, payable half-yearly at Old Michaelmas and Lady Day, and it was held that this was substantially a letting and hiring of the whole of the demised premises from Lady Day to Lady Day. "Though part of the farm is to be entered upon and quitted at Old Candlemas, and other part not till Old May Day, yet that is no more than the custom of most counties would have directed without any special words for that purpose in any taking from Old Lady Day, viz., that the arable land shall be entered upon at Candlemas to prepare it for the Lent corn, and the meadows not till May Day, when in those northern counties they are usually heyed for hay. (p)

A tenant entered into possession of a farm, under an agreement "to enter on the tillage land at Candlemas, and on the house and all other the premises on Lady Day following, and to quit the farm according to the

(m) *Oakapple v. Copous*, 4 T. R. 361. *Brown v. Burtinshaw*, 7 D. & R. 610.

(n) *Doe d. Eyre v. Lambly*, 2 Esp. 635.

(o) *Doe d. Heapy v. Howard*, 11 East, 498.

Doe d. Kindersley v. Hughes, 7 M. & W. 141.

Doe d. Davenport v. Rhodes, 11 M. & W. 600

(p) *Doe d. Daggett v. Snowden*, 2 W. Bl. 1224.

times of entry as aforesaid," and the rent was reserved at Michaelmas and Lady Day, and it was held that a notice to quit, delivered half a year before Lady Day, but less than half a year before Candlemas, was good: the taking being in substance from Lady Day, with a privilege for the incoming tenant to enter on the arable land at Candlemas for the sake of ploughing, &c.(q) The lessee of a dwelling-house, buildings, and bleaching manufactories, pasture and meadow land, entered into possession under an agreement for a lease, by which it was stipulated that the term of hiring should commence as to the meadow ground from the 25th of December last, as to the pasture from the 25th of March next, and as to the housing, out-housing, and other buildings, and all the rest of the premises from the first of May, and the first half year's rent was made payable on the day of Pentecost, and the other at Martinmas; and it was held that the substantial subject of demise being the house and buildings for the purpose of the manufacture, the time limited for taking possession thereof was the substantial time of entry, to which a notice to quit ought to refer, and not the 25th of December, the time limited for the taking possession of the meadow land, which was merely auxiliary to the principal subject of demise.(r)

Service of notice to quit.—If the notice to quit is served upon the actual occupiers of the demised premises, proof of such service is sufficient to sustain an action of ejectment.(s) If the tenant himself does not reside upon the property, a delivery of the notice to the wife or servant at the dwelling-house of the latter, is a sufficient service.(t) But the party to whom it is delivered should be expressly told that it is a notice to quit, and should be requested, either orally, or by means of a written or printed address or direction, to deliver it to the tenant.(u) If there is a personal service of the notice upon the tenant himself, no written direction or address upon the notice is necessary,(x) and if the notice is directed to the tenant by a wrong christian name, and he neglects to repudiate or send back the notice, he is deemed to have waived the misdirection, and is bound by such notice.(y) If the servant or agent of the lessee is in possession of the demised premises, the notice must be addressed to the principal; if the notice is given to or served upon the agent in his own name, it is insufficient.(z)

(q) *Doe d. Strickland v. Spence*, 6 East, 120.

(r) *Doe v. Watkins*, 7 East, 558.

(s) *Doe d. Morris v. Williams*, 6 B. & C. 41.
Roe d. Blair v. Street, 2 Ad. & E. 331. *Doe d.*
Ld. Bradford v. Watkins, 7 East, 553.

(t) *Jones d. Griffiths v. Marsh*, 4 T. R. 464.
Doe d. Neville v. Dunbar, 1 M. & M. 11. *At-*

ford v. Vickery, 1 Car. & M. 283.

(u) *Doe d. Buross v. Lucas*, 5 Esp. 153.
Smith v. Clark, 9 Dowl. 202.

(x) *Doe d. Matthesson v. Wrightman*, 4 Esp. 5.

(y) *Doe v. Spiller*, 6 Esp. 70.

(z) *Doe d. Cartledge v. Woodman*, 8 East, 223.

Waiver of a notice to quit.—If the tenant remains in possession after the expiration of a good and valid notice to quit, his possession then becomes an adverse tenancy and possession, and the landlord may either bring an action of ejectment against him, or he may, if the lease does not exceed seven years in duration, nor the rent twenty pounds per annum, proceed under the act of 1 & 2 Vict., c. 74, s. 1, before justices of the peace for the recovery of the possession of the demised premises. But if he permits the tenant to remain in possession, and demands and accepts rent in respect of the tenant's occupation of the property subsequently to the notice to quit; this amounts to a waiver of the notice, and to a restoration between the parties of the relationship of lessor and lessee.(a) The same result follows if the lessor distrains for rent, which he claims to be due in respect of the tenant's occupation subsequently to the expiration of the notice.(b) But if a banker or agent of the lessor, without any special authority from the latter, receives rent from the tenant, the act of such unauthorized agent does not, of course, amount to a waiver of the notice.(c) The money, moreover, must be paid and accepted as rent, and not by way of satisfaction of the lessor's claim for double rent or double value, under the statutes, for holding over.(d) But the giving of a second notice to quit before or after the expiration of the first notice does not amount to a waiver of the latter.(e) Nor does a collateral promise by the lessor not to act upon the notice under certain circumstances, or in the case of the happening of a certain event, amount to a waiver of the notice.(f) In some cases the conduct of a tenant in retaining possession and receiving the produce and profits of the demised premises after the expiration of a notice to quit given by him amounts to a waiver of such notice.(g)

Double yearly value for holding over.—Any tenant wilfully holding over and retaining possession of the demised premises after the determination of his term, and after possession has been demanded and notice in writing has been given him by the lessor, is liable (4 Geo. 2, c. 28, s. 1) to pay to the person kept out of possession double the yearly value of the lands, &c., detained.(h) An action of debt lies for the recovery of this penalty, and may be brought by the landlord after he has recovered possession of the land by an action of ejectment.(i) But it has been held

(a) *Goodright d. Charter v. Cordwent*, 6 T. R. 219. *Doe d. Cheny v. Batten*, Cowp. 243.

(b) *Zouch d. Ward v. Willingale*, 1 H. Bl. 311.

(c) *Doe d. Ash v. Calvert*, 2 Campb. 387.

(d) Cowp. 246, 247.

(e) *Doe d. Williams, v. Humphreys*, 2 East,

237. *Messenger v. Armstrong*, 1 T. R. 54. *Doe d. Digby v. Steel*, 3 Campb. 116.

(f) *Whiteacre v. Symonds*, 10 East, 13.

(g) *Jones v. Shears*, 4 Ad. & E. 832.

(h) As to the computation of the yearly value, *Robinson v. Lezroyd*, 7 M. & W. 48.

(i) *Sou'by v. Neving*, 9 East, 310.

that the act applies only to the case of a wilful and continuous holding over by the tenant after notice to quit, and not to a holding over under a *bonâ fide* claim of title or right, though erroneous. *(k)*

A weekly or quarterly tenant does not come within the operation of the statute. *(l)*

Demand of possession and notice.—In the case of a tenancy from year to year, the ordinary notice to quit at the end of the current year of hiring is a sufficient demand of possession to entitle the lessor to double yearly value. *(m)* If the tenant holds under a lease for a term of years certain, a notice to quit at the expiration of such term is likewise a sufficient demand of possession, and such notice may be given previous to the expiration of the term, or at any time afterwards, so long as the tenant continues to hold as a tenant at will. *(n)* If the landlord has done any act amounting to a waiver of his notice to quit, *(o)* he cannot, of course, make such notice the foundation of an action for double value.

Double RENT for holding over.—If any tenant gives notice to the lessor of his intention to quit at a particular time, (11 Geo. 2, c. 19, s. 18,) and does not deliver up possession of the premises at the time mentioned, such tenant, his executors, &c., is from thenceforth to pay to the landlord or lessor double the rent which he would otherwise have paid, to be levied, sued for and recovered, at the same times and in the same manner as the single rent. The tenant's notice to quit need not be in writing, in order to support the lessor's claim to double rent, *(p)* nor need the lease which the tenant has determined by his notice to quit, be a lease in writing. *(q)* But the notice must be a good notice to quit at some fixed time, and at a period when the tenant is able by notice to put an end to the tenancy. If the tenant merely gives notice that he will quit "as soon as he can possibly get another situation," *(r)* or gives a notice to quit in the middle instead of at the termination of the current term of hiring, or a notice of too short a duration, and which does not consequently bind the lessor, the lease is not determined, and there cannot, consequently, be any holding over by the tenant. *(s)* The liability for double rent is not confined, like the liability to double value, to tenants for term of life or terms

(k) 5 Esp. 216. *Hirst v. Horn*, 6 M. & W. 395.

(l) *Lloyd v. Rosbee*, 2 Campb. 454. *Wilkinson v. Hall*, 3 Bing. N. C. 530; 4 Sc. 301, N. C.

(m) *Wilkinson v. Colley*, 5 Bur. 2698. *Hirst v. Horn*, 6 M. & W. 393. *Poole v. Warren*, 8 Ad. & E. 582. *Lake v. Smith*, 4 B. & P. 179.

(n) *Cutting v. Derby*, 2 W. Bl. 1075. *Cobb*

v. Stokes, 8 East, 358. *Messenger v. Armstrong*, 1 T. B. 53.

(o) *Ryall v. Rich*, 10 East, 47.

(p) *Timmins v. Rowkinson*, 3 Bur. 1608.

(q) *Ib.* 3 Burr. 1603.

(r) *Farrance v. Elkington*, 2 Campb. 593.

(s) *Johnstone v. Huddleston*, 4 B. & C. 922; 7 D. & R. 411, N. C.

of years: but any weekly or quarterly tenant wilfully holding over after having given the lessor notice to quit, would seem to be as much liable to double rent as a tenant for life, or for a term of years. (*t*) A tenant who holds over for one year after notice to quit, paying double rent, may quit at the end of such year without fresh notice. (*u*)

Of the tenant's right to emblements and away-going crops, and to allowances for tillage, manure, &c.

All tenants who held by an uncertain tenure, and whose interest might at any time be determined by the will of the lord, were by the common law entitled to emblements, and the crops and annual produce of the soil which had been sown or planted by them, and which had not come to maturity at the period of the determination of their interest. (*x*)

In all farming leases, the custom of the country, with respect to the mode of cultivation and the rights of the tenant to the away-going crop, is impliedly annexed to the terms of the lease, unless the custom is excluded by express provisions and stipulations, (*y*) and by the general custom now prevailing in most parts of the country, the lessee, whether for a term of years or at will, is entitled, at the expiration of his tenancy, to the corn, plants, roots, and crops sown or planted by him in the last year of his term, and which had not at the period of his quitting the land come to maturity. (*z*) The general rule in the case of farm leases is that the tenant is bound to leave the land, when he quits, in the same state as he found it on taking possession. If he has taken the farm under a custom by which the outgoing tenant is bound to leave a certain quantity of clover and grass seeds, or fallows, or a certain number of acres of growing wheat, or turnips, or other produce, or a certain quantity of hay and straw, or manure, on the demised premises, he must in his turn, when he quits the land, leave it in the same state and condition and with the same privileges and advantages for the benefit of his successor that he himself enjoyed when he entered upon it. By the custom of some counties, the outgoing tenant takes two-thirds of particular crops, leaving one-third to the incoming tenant. (*a*) In some districts, all the hay and

(*t*) But see *Sullivan v. Bishop*, 2 C. & P. 359.

(*u*) *Booth v. Macfarlane*, 1 B. & Ad. 904.

(*x*) Litt. ss. 68, 69.

(*y*) Ante, 151, 152. *Clarke v. Royston*, 14 Law J., n. s. 143.

(*z*) *Wigglesworth v. Dalison*, 1 Doug. 201; 1 Smith's Leading Cases, 299.

(*a*) *Holding v. Pigott*, 5 M. & P. 427. *Griffiths v. Tombs*, 7 C. & P. 810.

straw must be left to be consumed on the farm; whilst in others, the tenant is entitled to take it away with him.

Sometimes the landlord or the incoming tenant has a right, and in some instances he is bound by custom, to take the away-going crops, and also the straw and hay, and sometimes the manure, from the outgoing tenant at a valuation. And when such a custom exists, the tenant has a right, after the expiration of his lease, and after he has quitted the premises, to enter upon the land as occasion may require to improve and tend the crop. (b) If the landlord or the incoming tenant does not take the crop at a valuation, the tenant has impliedly accorded to him by general custom and usage all such rights and privileges as are necessary to enable him to gather it in, and secure it, and sell or turn it to profit and advantage when arrived at maturity, such as free ingress and egress into and from the demised premises, (c) the temporary use of the barns to thrash it out, and yard room for the straw. And he has a right, moreover, to the possession of the field for a reasonable time for the carrying away as well as the cutting of his corn. (d)

If no custom exists giving the tenant a right to the away-going crop, the landlord is, as we have before seen, entitled thereto. The tenant, therefore, must in all cases make out and establish this custom. (e) When no such custom exists, the natural consequence is that the tenant does not till or sow the ground at the close of his term of hiring, and a custom therefore appears to prevail in all places where the outgoing tenant is not entitled to the away-going crop, for the incoming tenant or the landlord to enter to manure and till the land, and plant the spring corn, and prepare for the harvest prior to the termination of the lease and the commencement of his own term and interest. (f)

Lastly, it may be observed, that whatever custom regulates the tenant's rights on entering, the same custom regulates his rights on leaving, and the custom, whatever it is, may be given in evidence, as we have before seen, (ante, 152, 164,) although there is a lease under seal, or a written contract of demise between the parties, and will regulate and control their respective rights and liabilities so long as there is no express stipulation in the lease or written demise excluding the custom.

All customary allowances also as between incoming and outgoing

(b) *Strickland v. Maxwell*, 2 Cr. & M. 539.

(c) *Boraston v. Green*, 16 East, 81. *Strickland v. Maxwell*, 2 Cr. & M. 539.

(d) *Beavan v. Delahay*, 1 H. Bl. 5. *Griffiths v. Puleston*, 13 M. & W. 358. *Beaty v. Gibbons*,

16 East, 118.

(e) *Caldcott v. Smythies*, 7 C. & P. 808.

(f) *Kennedy & Granger on Tenancy and County Customs*.

tenants, or between the outgoing tenant and the landlord, are impliedly annexed to the express terms of the lease, such as allowances for manuring, tilling, fallowing, and sowing the land ; for seeds, and labour, foldage, and manure. (g)

The tenant's rights to growing crops and produce are in all cases strictly confined to annual crops or the first year's produce of seeds and roots sown or planted by him during the last year of his tenancy, and does not extend to trees, shrubs, and plants of a perennial character, (excepting the fruit-trees, plants, and shrubs of seedsmen and nursery gardeners,) an exception introduced for the benefit of trade. (h) Thus a border of box, planted by a tenant in a garden demised to him, cannot be taken up and removed at the expiration of his term, (i) nor a strawberry bed, (k) nor hedges, nor fruit trees. (l)

Of the tenant's right to remove superstructures and fixtures erected by him upon the demised premises.—Buildings and constructions of a permanent character, erected upon the demised premises by the tenant and attached to the freehold, are irremovable by him, unless they have been erected for trading purposes. *Quicquid solo plantatur solo cedit.* (m) Such are pillars of brick and mortar, built on the floor of a dairy by the tenant to sustain pans ; (n) also barns and beast-houses, waggon-houses, fuel-houses, pigeon-houses, carpenter's shops for mending waggons and carts, and agricultural implements employed and used upon the farm, and let into the ground, and not merely placed on the surface thereof or on a brick or stone floor ; (o) also a conservatory, hot-house, or greenhouse, erected on a brick or stone foundation, and attached thereto by permanent fastenings. (p)

If the tenant raises and constructs foundations of a permanent character for the reception of a superstructure of wood, such as a windmill, a pump, a Dutch barn or granary, a pigeon or fowl-house, or a conservatory, and the superstructure merely rests on this foundation or is attached thereto by screws or moveable pins or bolts, so as to be removable at pleasure without material or permanent injury to the freehold, the foundation belongs to the landlord as part and parcel of the land, and the

(g) *Dalby v. Hirst*, 3 Moore, 536. *Hutton v. Warren*, 1 M. & W. 477 ; ante, 151—153.

(h) Lord Kenyon, C. J., 2 East, 90 ; Heath, J., 4 Taunt. 316. *Wardell v. Usher*, 3 Sc. N. B. 508.

(i) *Empson v. Soden*, 4 B. & Ad. 655.

(k) *Welkerell v. Howells*, 1 Campb. 227.

(l) *Wyndham v. Way*, 4 Taunt. 316.

(m) *Mackintosh v. Trotter*, 3 M. & W. 186.

(n) *Leach v. Thomas*, 7 C. & P. 327.

(o) *Elwes v. Mawe*, 3 East, 38 ; 1 Smith's Leading Cases, 99—121. *Wood v. Hewett*, 10 Jur. 390.

(p) *Buckland v. Butterfield*, 4 Moore, 440 ; 2 B. & B. 54, s. c.

moveable structure placed on such foundation by the tenant continues the property of the latter, and may be carried away by him at the expiration of his lease. (*g*)

Trade fixtures.—Sheds, buildings, and erections, constructed by the tenant upon the demised premises for the purpose of carrying on trade, such as engine-houses of wood and brick, with chimneys and roofs erected to protect machinery used by the tenant in his trade, may be severed and removed; and so also may the varnish-houses and sheds of the varnish manufacturer, and the hot-houses and green-houses, &c. of the gardener and nurseryman. Amongst the various trade fixtures now held to be removable by the tenant, are soap-boilers, furnaces, fat vats, coppers, dying and brewing vessels, cider mills, baking ovens, steam-engines, and salt pans. (*r*)

Ornamental fixtures.—The tenant is also entitled to sever and carry away with him at the expiration of his term all ornamental fixtures, such as chimney-glasses, pier-glasses, ornamental chimney-pieces and stoves, tapestry and hangings nailed to the walls in lieu of ornamental paper or panels, (*s*) and ornamental cornices capable of being detached without substantial injury to the freehold. (*t*) The things removable are often determined and regulated by local custom and usage. In some counties, barns and granaries erected on stone pillars, or on pattens or blocks of timber, are always considered to be the goods and chattels of the tenant who has erected them, and are by custom and usage removable by him at the expiration of his lease. (*u*) If the tenant has entered into an express covenant to yield up at the expiration of his term "all erections and buildings that may be erected," or "all improvements that may be made" upon the demised premises, he cannot afterwards remove trade erections or buildings, or trade or ornamental fixtures. (*x*) And whenever he has a right of removal, he must exercise such right prior to the determination of his tenancy; he cannot after he has once quitted the demised premises, re-enter for the purpose of severing and removing fixtures. "After the

(*g*) *Grymes v. Boweren*, 4 M. & P. 143; 6 Bing. 487, s. c. *Rex v. Otley*, 1 B. & Ad. 161. *Wansborough v. Malton*, 4 Ad. & E. 884. *Davis v. Jones*, 2 B. & Ald. 165. *Rex v. Londonhorpe*, 6 T. R. 877.

(*r*) 42 Ed. 3, fol. 6, pl. 19; 20 Hen. 7, fol. 13, pl. 24. *Poole's case*, 1 Salk. 368. *Lawton v. Lawton*, 3 Atk. 13. *Penton v. Robart*, 2 East, 90. *Amos and Ferrard on Fixtures*. *Grady on Fixtures*.

(*s*) *Beck v. Rebow*, 1 P. Wms. 94. *Leach v.*

Thomas, 7 C. & P. 327.

(*t*) *Avery v. Cheslyn*, 3 Ad. & E. 75.

(*u*) 11 Vin. Abr. 154, *Executors U.* pl. 74. *Culling v. Tuffnel*, Bull. N. P. 34.

(*x*) *Naylor v. Collinge*, 1 Taunt. 19. *Thresher v. E. L. Waterworks Company*, 2 B. & C. 608; 4 D. & R. 62, s. c. *Martyr v. Bradley*, 2 M. & Sc. 25; 9 Bing. 24, s. c. *Administratrix of Penry v. Brown*, 2 Stark. 403. *West v. Blake-way*, 3 Sc. N. R. 218.

term they become a gift in law to him in reversion, and are not removable." (y)

General DUTIES, OBLIGATIONS, and LIABILITIES of the LESSOR and LESSEE.

Liability of THE LESSOR.—From every contract of hiring and letting there results by implication of law, as we have already seen, a covenant or promise on the part of the lessor to put the lessee into possession of the subject matter of the demise, and clothe him with a lawful title to hold and enjoy it during the continuance of the term for which it is granted to be enjoyed. (z) The usual express covenant by the lessor, that the lessee shall peaceably and quietly possess and enjoy the demised premises without any let, suit, trouble, or disturbance by the lessor, his heirs, &c., or any person claiming under him or them, is not broken by an entry on the tenant by the land-tax collector, to distrain for arrears of land-tax due from the lessor. (a)

Liability of THE LESSEE —Non-acceptance of POSSESSION and non-payment of RENT.—A contract for the letting and hiring of realty, being a contract for an interest in land, comes, as we have already seen, within the fourth section of the Statute of Frauds, which enacts that no action shall be brought upon any contract for an interest in land, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. (Ante, 91.) A lessee, therefore, who has contracted orally for the hire of realty, and who neglects or refuses to accept possession of the demised premises, cannot be sued upon such oral agreement for damages for not taking possession, nor upon any oral promise to pay rent; neither can he be sued for use and occupation. (b) If, however, the lease has been created by simple contract in writing for a term not exceeding three years, and has been made subsequently to the first of October, 1845, and a fixed rent has been reserved, or the lessee has agreed to pay a certain specified rent, he may then be sued upon such written contract, either for not taking possession of the demised premises, or for non-payment of the rent; and although the lease (by reason of its not having been made by deed) may be void as to the duration of the term, yet if the intended

(y) Per Holt, C. J., 1 Salk. 868. Gibbs, C. J., 7 Taunt. 191; 1 Atk. 477; Amb. 113.

(z) Ante, 207, 208, 209, 351. *Messent v. Reynolds*, 10 Jur. 550. *Line v. Stephenson*, 7

Sc. 69.

(a) *Stanley v. Hayes*, 3 Ad. & E. n. s. 105.

(b) *Inman v. Stamp*, 1 Stark. 12. *Edge v. Strufford*, 1 Cr. & J. 398.

lessee enters into possession, and has the use and enjoyment of the land, he is responsible for the payment of the same amount of rent as that reserved by the lease. The contract, though void as a present demise for the term specified, would be good as an agreement for a lease, and the tenant would be deemed, in contemplation of law, to hold upon such of the terms and stipulations as might be applicable to a yearly tenancy.(c)

Express and implied covenants and promises to pay rent.—We have already seen, that in the case of leases under seal, the law implies from the words yielding and paying, or any equivalent words amounting to a reservation of rent, a covenant on the part of the lessee to pay the rent so reserved; and in the case of parol leases, a promise to the like effect.(d)

The liability of a lessee upon all express and implied covenants and agreements for the payment of rent, is dependent upon his being put into possession, or being tendered and offered, and afforded the power and opportunity of taking possession of the demised premises”(e) “A man who enters into an agreement to let premises to another, binds himself to give possession, and not to give to the party to whom he demises a mere right to take possession from a wrongdoer by an action of ejectment.”(f) “If you cannot give full possession of the thing demised, you cannot sue in covenant for the rent.”(g) The quiet enjoyment also by the lessee as against the lessor, and all that come in under him by title, and against others claiming by title paramount during the time in respect of which the rent is claimed to have accrued due, is a condition precedent to the tenant's liability for the payment of such rent.(h) But the tenant is not released from liability by reason of an eviction by a mere wrongdoer and trespasser, who has no title at all to the possession of the demised premises.(i)

Thus where an action of debt was brought for three years' arrears of rent reserved upon a lease of a farm, and the defendant pleaded that

(c) *Doe v. Bell*, 5 T. R. 472. *Richardson v. Giffard*, 1 Ad. & E. 52; 3 N. & M. 325. *Doe v. Amey*, 12 Ad. & E. 479. *Pistor v. Cater*, 9 M. & W. 315; *Bayley, J.*, 10 East, 354. *Cooch v. Goodman*, 2 Ad. & E. n. s. 580; 2 G. & D. 164, s. c. *Fishmongers' Co. v. Robertson*, 6 Sc. N. R. 56. *Chanter v. Dewhurst*, 12 M. & W. 823.

(d) Ante, 207, 209; Bac. Abr. Leases, 633. Covenant, (B.) 342.

(e) *Hawkes v. Orton*, 5 Ad. & E. 367; N. & M. 844, s. c. The lessee may be clothed with the possession without a single hour's occupation. *Bid v. Higginson*, 2 Ad. & E. 704; 4 N. & M. 512.

(f) Tenetur locator obligatus rem locatam ad

usum dare Bract. Lib. 2, c. 28, fol. 62. Best, C. J., *Cos v. Clay*, 3 M. & P. 59; 5 Bing. 469, s. c. *Neale v. Mackenzie*, 1 M. & W. 747.

(g) *Bolfe, B.*, *Holgate v. Kay*, 1 C. & Kirw. 341.

(h) So by the French law, c'est un suite de l'obligation que le locateur contracte envers le conducteur par le contrat de louage pr  stare ei frui licere, qu'il ne puisse apporter aucune trouble a la jouissance du conducteur pendant tout le temps que le bail doit durer. Pothier, Louage, No. 266.

(i) *Granger v. Collins*, 6 M. & W. 458. *Dunn v. Di Nuovo*, 3 Sc. N. R. 487. Eviction by a railway company under its act of parliament. *Wainwright v. Ramsden*, 5 M. & W. 602.

Prince Rupert, an alien and enemy of the king, invaded the realm with an army, and with divers armed men did enter upon the demised premises, and did drive away the defendant's cattle, and expel him from the land demised to him by the plaintiff, and keep him out, so that he could not enjoy the lands during the term, "it was resolved that the matter of the plea was insufficient. And this difference was taken, that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over there, the law will excuse him; but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. Another reason was added, that as the lessee is to have the advantage of casual profits, he must run the hazard of casual losses, and not lay the whole burthen of them upon his lessor.(k)

So where the parliament, during the civil wars, took possession of a house which had been demised to a lessee for a term of years, and turned it into a hospital for sick and maimed soldiers, and so prevented the lessee from having any beneficial occupation thereof for several years; notwithstanding which, the lessor brought an action of debt for the rent; no question appears to have been made, but that the lessee was bound at common law to make good the rent; and the lessee consequently brought his bill in equity for relief, on the ground that he had no remedy over against the wrongdoers, because it was an act of force in the parliament, which had been pardoned by the act of oblivion; but it does not appear that he got relief even in equity.(l)

Having put the lessee, therefore, into possession of the demised premises, or placed them at his disposal, and clothed him with the legal title to the possession and occupation thereof for the term granted by the lease, the lessor has done all that it is necessary for him to do to entitle himself to the rent at the time that it is made due and payable; he does not, in cases of demises of realty, warrant that the premises are, at the time of the demise, or that they shall continue to be during the term, in any particular state or condition, or fit for any particular purpose; and the lessee therefore is bound to pay his rent, although the subject matter of the demise is not fit for the purpose for which he required it, and although he may have had no beneficial use or enjoyment thereof.(m) If,

(k) *Paradine v. Jane*, Aleyn. 27; Sty. 47; 1 Ro. 939; a case, observes Lord Alvanley, C.J., founded on much good sense, 3 B. & P. 300. Kenyon, C.J., *Blight v. Page*, ib., 298, 297. Lawrence, J., 3 T. R. 267. Lord Ellenborough,

C.J., 3 M. & S. 270, 271. *Barrett v. Dutton*, 4 Campb. 333.

(l) *Harrison v. Lord North*, 1 Ch. Ca. 84.

(m) *Surplice v. Farnsworth*, 7 M. & Gr. 577; 8 Sc. N. R. 307.

indeed, the lessor has been guilty of any fraudulent concealment of defects which ought in good faith to have been disclosed, or has resorted to any misrepresentation calculated to mislead the lessee in some important particular as to the state and condition of the demised premises, the contract would be void, and the lessee would be discharged from the rent; but in the absence of all fraud and deceit, he is bound by his express covenant or contract, and must pay his rent, although he has not had that beneficial use and enjoyment of the demised premises which was anticipated.

Thus where the defendant took the eatage of a meadow from the plaintiff for the term of six months, at a rent of £40, and turned fifteen head of cattle into the meadow, eight of whom died from the poisonous effects of a quantity of refuse paint which had been placed on a manure heap, and had inadvertently been spread over the grass prior to the defendant's occupation, and had afterwards been eaten by the cattle; and the defendant then took his stock off the land, and tendered back the possession of the meadow to the plaintiff, which she refused to receive; it was held that the defendant was liable for the rent at the time it became due, although the eddish at the time of the demise was wholly unfit for the purpose for which it was taken, and the defendant had not had any beneficial use or enjoyment of it. The Court of Exchequer was of opinion in this case, that all that the plaintiff had undertaken to do was to put the defendant in possession of the land and herbage, and that there was no implied warranty or undertaking on her part that the produce of the soil was fit for the feeding of cattle, or for any other specific purpose.⁽ⁿ⁾ So where an action was brought for the nonpayment of the rent of a house, and the defendant pleaded that the house was demised to him for the purpose of his inhabiting the same, and that at the time of the demise, and of his taking possession, and from thence until he quitted, the house was unfit for habitation, and he could not dwell therein, or have any beneficial use or occupation thereof, by reason of its being greatly infested and overrun with bugs, without any default on his part; and that before the rent became due, and as soon as he discovered the condition of the tenement, he quitted it, and gave notice to the plaintiff, and tendered him the possession thereof; and it was held that the plea was no answer to the action, inasmuch as the law, in cases of demises of unfurnished houses, implied no warranty or engagement on the part of the lessor, that the house was at the time of the demise, or should be at the commencement of the term, in a fit and proper state and condition for habitation; and even if such a warranty or

(n) *Sutton v. Temple*, 12 M. & W., 52.

engagement could be implied, the breach of it would not give the tenant a right to abandon his lease, and vacate the possession, and refuse to pay rent; but that his remedy would be by a cross action to recover compensation for the damage he might have sustained by the breach of such implied contract.^(o) "We are all of opinion," observes Parke, B., in delivering the judgment of the Court of Exchequer, "that there is no contract, still less a condition, implied by law on the demise of real property only, that it is fit for the purpose for which it is let. The principles of the common law do not warrant such a position; and though in the case of a dwelling-house taken for habitation, there is no apparent injustice in inferring a contract of this nature, the same rule must apply to land taken for other purposes—for building upon or for cultivation—and there would be no limit to the inconvenience which would ensue. It is much better to leave the parties in every case to protect their interests themselves by proper stipulations; and if they really mean a lease to be void by reason of any unfitness in the subject for the purpose intended, they should express that meaning." ^(p)

The rent reserved on a demise of realty issues out of the land, and is payable in respect of the estate or interest in the soil granted to the lessee, without reference to the particular state or condition of the demised premises, or their fitness or unfitness for cultivation or habitation. The lessee's liability for the rent, therefore, continues in every event, and in every state and condition of the demised premises; and although houses and buildings, fences and superstructures, erected upon the soil, and crops growing thereon, be destroyed by floods, or burned by lightning or accidental fire, or be thrown down by enemies, yet is the tenant liable to pay the rent so long as the land remains to him, and his legal title to the occupation and use thereof continues.^(q)

If the landlord is bound by custom, or has entered into an express covenant, to repair and uphold the house demised to him, and the lessee covenants to pay rent, the covenants are independent covenants, and the repairing and upholding of the house by the lessor is not a condition precedent to the liability of the lessee upon his covenant. Thus where an action of debt was brought for the rent of a house demised by the plaintiff to the defendant, and the defendant pleaded that by the custom of London

(o) 27 Hen. 6, (Trin. Term.) fol. 10, pl. 6. Hil. Term, 14 Hen. 4, fol. 27, pl. 35; Bro. Abr. (Dette) pl. 13, fol. 220.

(p) *Hart v. Windsor*, 12 M. & W. 68—88. *Surplice v. Farnsworth*, 8 Sc. N. R. 316; 7 M. & Gr. 584, s. c.

(q) *Carter v. Cummins*, cited 1 Ch. C. 84. *Pindar v. Ainslie*, cited 1 T. R. 312. *Bayne v. Walker*, 3 Dow. 233. *Leeds v. Chestham*, 1 Sim. 146. *Arden v. Pullen*, 10 M. & W. 321. *Marquis of Bute v. Thompson*, 13 M. & W. 493, 494.

the lessor was bound to repair and uphold the house sufficiently for habitation during the term, and that before the rent accrued due the house became so ruinous by reason of a tempest, that the defendant could not abide therein, or derive any profit therefrom; and he thereupon requested the landlord to amend the house, and he would not; whereupon the defendant, before the rent accrued due, quitted the house; it was held that the defendant might have his action of covenant against the lessor, and so recover damages for the non-repair of the house; but that he could not avail himself of the lessor's neglect as an answer to the demand for rent. (r) So where the lessor was bound by covenant to repair, and would not, and the defendant caused the house to be repaired, it was held that he could not set off the expense thereof against the lessor's claim for the rent. (s) And if the lessee covenants to pay rent, and also to repair, with an express exception of casualties by fire and tempest, the exception is confined to the covenant to repair, and does not qualify or affect the liability upon the covenant to pay rent, unless it has been extended thereto by express words. (t)

The Roman law, in its exposition and enforcement of leases and demises of realty, is much more favourable to the tenant than our own law. There the enjoyment of the thing for the use of which the rent was agreed to be paid, was a condition precedent to the lessor's right to demand the rent. If, for example, the tenant was evicted by irresistible force, and kept out of possession, without any default on his own part, he was discharged from the rent, whether the eviction was the act of the lessor himself, or of persons having title, or the act of mere wrongdoers. (u)

If a house demised to a tenant for habitation became ruinous and uninhabitable; if the windows were blocked up or darkened, and the tenant deprived of light and air by the raising of the roof of an adjoining house, or his use and enjoyment of the property were interfered with by a nuisance which he had no means of abating, he might quit the demised premises, vacate his lease, and refuse further payment of rent. (x) If pasture land was demised for the purpose of feeding cattle, and poisonous herbs grew up and destroyed the beasts, the landlord lost his right to the rent. (y) If lands were granted to farm for the term of one year only, and the tenant

(r) T. Term, 27 Hen. 6, fol. 10, pl. 6. Bro. Abr. Dette, pl. 18; 7 M. & Gr. 584.

(s) *Hill v. Hanks*, Hil. Term; 14 Hen. 4, fol. 27, pl. 35. Bro. Abr. Dette, pl. 72.

(t) *Mont v. Cooper*, 2 Str. 763. *Belfour v. Weston*, 1 T. R. 310. *Weigall v. Waters*, 6 T. R. 488.

(u) Dig. lib. 19, tit. 2, lex 15, § 7, lex 33.

And see the French Cod. civ. 1726, 1727.

(x) Dig. lib. 19, tit. 2, lex 15, § 1; lex 25, § 2.

(y) Si saltum pascuum locasti in quo herba mala nascebatur, et pecora vel demortua sunt, vel deteriora facta, quod interest præstabitur, si scisti, si ignorasti pensionem non petas. Dig. lib. 19, tit. 2, lex. 19, § 1.

by reason of some inevitable accident, such as a volcanic eruption, an earthquake, a frost, a hail storm, an inundation, or a hostile incursion, lost the whole produce of the soil, and reaped nothing, he was discharged from his rent.(2) If a partial injury only had been sustained; if the growing crops were damaged by an extraordinary drought, or the unusual inclemency of the weather, the lessee was entitled to a proportionable abatement of his rent. But in order to sustain his claim for an abatement, he was bound to show that the loss arose from some unusual occurrence not reasonably to have been expected and contemplated by the parties at the time of the making of the contract.(a) He was never granted an abatement of rent in respect of losses in any way attributable to his own want of diligence or skill, nor in respect of any accident which might reasonably have been foreseen and guarded against,(b) nor for inconsiderable and trifling losses.(c) And in all leases for terms of years, the good years were to be taken with the bad years, so that the lessee could not claim to be excused from rent in respect of the total loss of the harvest in any one year of his tenancy, but could only claim the abatement towards the expiration of the term, upon a fair average of profit and loss.(d) And in cases of emphyteutical leases, which were demises of land for long terms of years at low rents for building and improvements, the tenant could claim no abatement of his ground-rent in respect of any partial loss, but he was discharged altogether from the rent if the land was overwhelmed by an inundation and permanently submerged, or was swallowed up by an earthquake, or covered with volcanic ashes or lava.(e)

Lastly, the lessee was entitled by the Roman law to claim payment from the landlord of all reasonable expenses incurred by him in extraordinary repairs rendered necessary for the purpose of sustaining and preserving the demised premises from a threatened danger, and also of the value of all permanent improvements made upon the land in the course of his occupation.(f)

(2) *Ib.* lex. 15, § 1, 2.

(a) *Domat.* (Louage,) No. 4, 5, 6. *Pothier*, (Louage,) No. 158.

(b) *Omnem vim cui resisti non potest dominum colono prestare debere ait, ut puta fluminum, graculorum, sturnorum, et si quid simile acciderit, aut si incurus hostium fiat. Si qua tamen vitia ex ipsa re oriantur, hæc damno coloni esse, veluti si vinum coacuerit, si rancia aut herbis segetes corruptæ sint. Sed et si uredo fructum oleæ corruerit, aut solis fervore non adueto id acciderit damnum domini futurum. Si vero nihil extra consuetudinem acciderit damnum coloni debere.* Dig. lib. 19, tit. 2. lex 15, § 2.

(c) *Modicum damnum æquo animo ferre*

debet, ib.

(d) *Si uno anno remissionem quis colono dederit ob sterilitatem deinde sequentibus annis contigit ubertas nihil obesse domino remissionem, sed integram pensionem etiam ejus anni quo remiati exigendam.* *Ib.* § 4.

(e) *Instit.* lib. 3, tit. 25, § 3; *Cod.* lib. 4, tit. 66, lex. 1.

(f) *In conducto fundo si conductor sua opera aliquid necessario vel utiliter auxerit, vel edificaverit vel instituerit cum id non convenisset, ad recipienda ea quæ impendit ex conducto cum domino fundi experiri potest.* Dig. lib. 19, tit. 2, lex 55, § 1.

If the lessor's title to the premises expires, the lessee may, by the common law, set up that fact as an answer to a demand for the rent, although he is estopped from disputing the original right of the lessor to demise.^(g) And if he has entered into an express agreement with a person who claims to be the landlord to pay rent to the latter, he is not precluded from showing that the agreement was induced by misrepresentation, or made under a mistake if he was not originally let into possession by the party claiming the rent under such agreement.^(h)

LIABILITY of the TENANT to a DISTRESS for RENT.—The lessor's right to enter in person or by deputy upon the demised premises and distrain the goods and chattels of the tenant for rent in arrear, without legal process, and without the intervention of the ministerial officers of the law, has existed in this country from so early a period "that we have no memorial of its original with us."⁽ⁱ⁾ It was doubtless derived from the Roman law, which considered all the chattels and movables and personal property which the tenant brought upon the demised premises,^(k) and all the crops and fruits and produce of the soil growing, or stored upon the land, to be mortgaged or pledged to the lessor as a security for the due payment of the rent, so that the lessor might, if rent was due and unpaid, enter upon the demised premises and take possession of such goods and chattels and produce, and hold the same as a security for the amount due.^(l) This pignorial doctrine of the Roman law, established for securing the prompt payment of rent, was recognized and admitted in our own law at a very early period;^(m) it has been imported into the French law, and into the various modern codes founded on the ancient Roman system of jurisprudence.

The power of entering upon the land and taking corporal possession of the pledge, is impliedly accorded to the lessor (Litt. sec. 214) on every demise of realty where there is an express reservation of, or an agreement by the tenant to pay, a fixed ascertained rent. If there has been merely a permissive occupation of the property, without any previous payment of rent, referable to some certain term of hiring, or to some aliquot portion of a year, the lessor has no right of entry upon the land nor power to distrain, but must proceed by way of action upon the implied promise of the

(g) *Dowes v. Cooper*, 2 Ad. & E. n. s. 263.

(h) *Claridge v. Mackenzie*, 4 Sc. N. E. 796.

(i) Gilbert on Distress; 2 Bro. Abr. Distress, fol. 252; Bradby, 2.

(k) *Ex jure utimur ut quæ in prædia urbana inducta et illata sunt, pignori esse credantur, quasi id tacite convenerit.* Dig. lib. 20, tit. 2, lex 4.

(l) *In prædiis rusticis fructus qui ibi nascuntur,*

tacite intelliguntur pignori esse domino fundi locati, etiamsi nominatim id non convenerit. Dig. lib. 20, tit. 2, lex. 7; Cod. lib. 8, tit. 15, lex 3.

(m) *Si res immobilis, locata fuerit et conducta sicut domus et hujusmodi, omnia invecta et illata tam pro mercede quam aliis pignori sunt annexa.* Bract. lib. 2, fol. 62, cap. 28.

tenant to pay a fair and reasonable compensation for the permissive use and enjoyment of the property. (o)

The bankruptcy of the tenant, and the allowance of his certificate under the bankrupt acts, does not release or extinguish the rent due at the time of the bankruptcy, from such tenant, or in anywise abridge or affect the landlord's right to distrain goods on the demised premises. (p)

The power of distress is in all cases subservient to prerogative process issued by the crown such as an extent, so that if the landlord has actually distrained and impounded the goods and chattels of the tenant upon the premises, such distress must give way in favour of the extent, and the sheriff may, consequently, take the goods out of the hands of the landlord and sell them for the benefit of the crown. (q)

At common law the landlord could not, it seems, have distrained after the expiration of the term for rent that accrued due before the determination thereof, as his reversion was then gone, the entire estate being revested in him in possession; (r) but now, by 8 Ann. c. 14, s. 6, 7, it is enacted that it shall be lawful for him to distrain for arrears of rent after the determination of the lease in the same manner as he might have done, if such lease had not been ended or determined; provided such distress be made within six calendar months after the determination of the lease and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom such arrears became due. And it has been held that if the tenant holds over, or the contract between them continues by tacit consent beyond the time for which they originally contracted, all the rights and properties belonging to the original contract are also continued, and among them the landlord's right to distrain. Therefore, where a part of the tenant's corn remained in a barn on the demised premises beyond the period of six calendar months, but within the term allowed by custom for the outgoing tenant to get in and dispose of his crop, it was held that the corn might be distrained by the landlord. (s) But the holding of the tenant must, it seems, be a holding in the character of a lessee. Where, therefore, a tenant went away leaving behind him a cow and a few pigs without asking permission to leave them, or saying when he was going to take them away, and the succeeding tenant entered and took possession, it

(o) 5 B. & Ald. 325; 5 M. & P. 375. *Harmerton v. Stead*, 5 D. & R. 211; 3 B. & C. 482, s. c.

(p) *Newton v. Scott*, 9 M. & W. 484; 10 M. & W. 471, s. c. in error.

(q) *The King v. Cotton, Parker*, 112. *Re v. Sotherby*, Bunb. 5.

(r) Bro. Abr. (Distress) pl. 19. 74. Anon. Keilw. 96.

(s) *Beavan v. Delahay*, 1 H. Bl. 9. *Lewis v. Harris*, ib. 7, n. (a). *Bayley, J., Boraston v. Green*, 16 East, 81; Anon. Keilw. 96. *Nuttall v. Staunton*, 4 B. & C. 51.

was held that the lessor had no right to distrain the things so left as they did not appear to have been left by the tenant with a view of continuing the possession and occupation of the premises.(t)

Distress by agents.—A mere receiver of rents (not being a receiver appointed by the Court of Chancery) has no power to distrain although he may be authorized to collect and receive the rents for his own benefit.(u) And when an agent or bailiff receives a special authority from the lessor to levy a distress upon the demised premises, the authority must be given and acted upon in the name of the lessor or reversioner, and not in the name of the agent or ministerial officer charged with the execution of the process. A receiver appointed by the Court of Chancery has a power of distress, and need not previously apply to the court for a particular order for that purpose. But if there should be any doubt as to the party having a legal right to the rent, he should make an application to the court for an order, as he must distrain in the name of the person who has that right.(x)

Distress by joint tenants, coheirs, and copartners.—One joint owner or joint reversioner may distrain alone, but he must avow and justify the taking of the distress in his own right, and as bailiff to the other.(y) He may also sign a warrant of distress, and appoint a bailiff to distrain for rent due to all, unless the others expressly dissent.(z) The same rule prevails in the case of copartners and coheirs in gavelkind, any one of whom may avow and justify the distress in his own right, and make cognizance as the bailiff of the others without averring or showing any express authority from them to distrain.(a) If the distress is made by a bailiff or agent on behalf of all, all must join in the avowry and conuzance.(b)

Distress by tenants in common.—As tenants in common have several estates, and are severally entitled to the rent and the reversion of the demised premises, they should make several distresses. They may, of course, authorize a bailiff to distrain on behalf of all, or one tenant in common may distrain on his own account, and as the bailiff and agent of the others, but they must avow and justify the taking of the distress separately in respect of their several shares. "Therefore, if three tenants in common distrain thirty beasts, one of them must avow for ten, the other for ten, and

(t) *Taylorson v. Peters*, 7 Ad. & E. 110; 2 N. & P. 622, s. c.; Will. Woll. & Dav. 644, s. c.

(u) *Ward v. Shew*, 2 M. & Sc. 756; 9 Bing. 608, s. c.

(z) Per Ld. Hardwicke, *Pitt v. Snowden*, 8 Atk. 750. *Dancer v. Hastings*, 12 Moore, 34; 4 Bing. 2, s. c. *Bennett v. Robins*, 5 C. & P. 379. *Brandon v. Brandon*, 5 Mad. 473.

(y) Per Holt, C. J., *Pullen v. Palmer*, 5 Mod. 73, 150; 3 Salk. 207.

(s) *Robinson v. Hoffman*, 1 M. & P. 474; 4 Bing. 562; 3 C. & P. 234, s. c.

(a) *Leigh v. Shepherd*, 5 Moore, 297; 2 B. & B. 465, s. c.

(b) *Stedman v. Bates*, 1 Salk. 389.

the third for ten more.”(c) And one tenant in common may distrain for his own share of the rent, although the rent has been reserved in one sum payable to all generally, and not in several sums payable to each, and therefore, where a lessee holding under two tenants in common, at a yearly rent of 18*l.*, payable quarterly, received notice from one of them to pay to him a moiety of the rent as soon as it became due, and the lessee, notwithstanding such notice, paid the whole rent to the other tenant in common, it was held that the party who had thus given the notice might distrain upon the land for his moiety of the rent.(d)

Fifty acres of arable land were demised by four persons (whose original title did not appear) at one entire rent of 94*l.* per annum, to be divided and paid to the four lessors separately in equal portions; and it was held that as between themselves and the lessee they must be taken to be tenants in common of the reversion, and that one of the four was entitled to distrain for a fourth part of the rent independently of the rest. (e)

If lands and houses, or corporeal or incorporeal hereditaments have been demised together at one entire rent, and the lease is void as to part of the subject matter of the demise and good for the residue, the lessor cannot distrain for the rent, as there is no distinct and ascertained rent fixed in respect of the part for which the lease is good. Thus, where a rectory, messuage, and tithes were demised at a fixed rent of 200*l.*, payable quarterly, and the demise was void as to the tithes not being under seal, it was held that the landlord could not distrain for any portion of the rent. (f) So where a contract was entered into for the letting and hiring of one hundred acres of land, at the annual rent of 79*l.*, and the lessee, on his entry upon the demised premises, found eight acres in the possession of another tenant under a prior demise, who kept possession thereof during the whole term in respect of which the rent was claimed, it was held that the lessor could not distrain for the rent, inasmuch as the demise of the eight acres was wholly void, and the rent was indivisible and unapportionable. (g)

An oral agreement was entered into between the proprietor of a marl pit and brick mine, and a potter and brickmaker, upon the terms that the latter should pay 8*d.* per solid yard for all the marl that he got out of the marl pit, and 1*s.* 8*d.* per thousand for all the bricks that he made from the brick mine, by quarterly payments at the usual quarter days;

(c) Litt. sec. 314—317. Per Holt, C. J., *Pullen v. Palmer*, 3 Salk. 207. *Philpott v. Dobbinson*, 6 Bing. 104; 3 M. & P. 320, a. c.
(d) *Harrison v. Barnby*, 5 T. R. 246. *Do* *d. Fisher v. Mitchell*, 3 Moore, 229.

(e) *Whitley v. Roberts*, M. Cl. & Y. 107.
(f) *Gardiner v. Williamson*, 2 B. & Ad. 339.
(g) *Neale v. Mackenzie*, 1 M. & W. 763; 2 Gale, 174 (in error).

and the brickmaker took possession of the pit and the mine, and dug marl and burnt bricks, and made several quarterly payments, and it was held that this was a demise from year to year at a rent capable of being ascertained with certainty, and that the lessor, therefore, was entitled to distrain. (*h*)

If a tenant has entered into possession under an agreement which does not operate as a present demise at a fixed rent, but merely as an executory contract for a future lease afterwards to be granted, and the landlord neglects to grant the lease, and the tenant continues to occupy without paying any rent or making any absolute and unconditional admission of any specific sum being due as rent in respect of such occupation, the landlord has no right to distrain. (*i*) But as soon as by payment of rent or otherwise, a tenancy from year to year at a fixed rent can be implied, (*k*) the landlord may distrain for all rent subsequently accruing due. Thus, where a tenant took possession of a farm under an oral agreement for a lease for the term of ten years, at a rent subsequently to be fixed and agreed upon, but no lease was ever prepared, and the tenant occupied for two years, paying the sum of 94*l.* half yearly at Michaelmas and Lady Day to the landlord; it was held that he must be deemed to be a tenant from year to year at an annual rent of 188*l.*, payable half yearly at Michaelmas and Lady Day; that the tenancy was an intermediate yearly tenancy at a fixed rent, payable at ascertained periods, and that the landlord, therefore, was well entitled to distrain for the rent as it became due. (*l*)

And although the contract or agreement under which the tenant enters may only amount to an agreement for a future lease, and no rent may have previously been paid, yet if the tenant, after an occupation of more than half a year, "promises to pay a rent certain, or settles it in account, a new agreement may be inferred under which the landlord may have a right to distrain." (*m*) Thus, where a tenant who had entered and taken possession of a brewery under an agreement for a lease thereof, at an annual rent of 450*l.*, and after an occupation of more than half a year an account was rendered to him by the landlord, the first item of which was "half a year's rent, 250*l.*," and the tenant seeing this, said that he had been overcharged 25*l.*, whereupon the item for rent was altered to

(*h*) *Daniel v. Gracie*, 6 Ad. & E., n. s., 145.

(*i*) *Hogan v. Johnson*, 2 Taunt. 148. *Dunk v. Hunter*, 5 B. & Ald. 322. *Regnart v. Porter*, 5 M. & P. 370; 7 Bing. 451, s. c.

(*k*) *M'Leish v. Tate*, Cowp. 783. *Mann v. Lovejoy*, R. & M. 355.

(*l*) *Knight v. Bennett*, 11 Moore, 222; Bing. 361, s. c.

(*m*) *Tindal, C. J.*, 5 M. & P. 375.

225*l.*, to which the tenant assented; it was held that this was evidence of an admission on the part of the tenant of a tenancy from year to year at an annual rent of 450*l.*, payable half yearly, so as to give the landlord a right to distrain. (*n*)

A lessee agreed to take, and the lessor to let, a house and premises for the term of sixty years, at the yearly rent of 25*l.*, payable quarterly, and the lessor agreed to complete the house and fix a bresummer in the back front window, and allow the lessee 15*l.* towards erecting an oven. The lessee then took possession and built the oven, but the lessor never completed the house nor fixed the bresummer. After the lessee had occupied the house from Christmas 1826 to Midsummer 1830, the lessor applied to him for the rent due, and was refused payment thereof, on the ground that the house had not been completed, whereupon the lessor distrained for the rent; and it was held that the distress was illegal, as the condition upon which the rent was to become due remained unaccomplished. (*o*) So where an oral agreement was entered into for the letting and hiring of a house and furniture at an annual rent of 170*l.*, payable quarterly, the house to be furnished completely in a manner suitable to a ladies' school, and the lessee took possession, and received a written agreement for signature, which he declined to execute until the house was furnished by the lessor according to his promise; but the lessee continued to occupy the house, and the lessor distrained for a quarter's rent; it was held that the furnishing of the house by the lessor in the manner agreed upon was a condition precedent to the tenant's liability for the payment of the rent, and that the distress, therefore, was unjustifiable. (*p*)

Whenever a covenant or promise to pay rent is conditional and dependent, and the lessor is ready and willing to fulfil the condition on his part, but the lessee prevents him, the lessor shall have his power of distress. (*q*)

Rent when due.—Construction of agreement.—A landlord agreed to let a dwelling-house to a tenant at a yearly rent of 50*l.*, which the tenant agreed to pay. And the tenant also agreed "to keep the house in tenantable repair; likewise the stable and loft at a further rental of 25*l.* per annum, to be paid on the usual quarter days;" and it was held that this was a demise of two different sets of premises at separate rents, payable at different periods; that the 50*l.* rent was payable yearly, and the 25*l.*

(*n*) *Cox v. Bent*, 2 M. & P. 281; 5 Bing. 185, s. c.

(*o*) *Regnart v. Porter*, 5 M. & P. 370; 7 Bing. 451, s. c.; ante, ch. 6.

(*p*) *Mechelen v. Wallace*, 7 Ad. & E. 54, n.; ante, ch. 6.

(*q*) *M'Leish v. Tate*, Cowp. 783, 784.

rent payable quarterly, and that the landlord consequently could not distrain for the first mentioned rent before the expiration of the current year. (*r*)

A contract was entered into for the letting and hiring of a house for a year certain, at a rent payable quarterly "or half quarterly if required," and the tenant entered into possession and paid his rent quarterly for the first year of the tenancy, at the expiration of which period the lessor, without any previous demand or notice to the tenant, distrained for half a quarter's rent then alleged to be due; and it was held that the lessor had no right so to do without giving a previous intimation and notice to the tenant of his election to take the rent half quarterly. (*s*)

A distress by the lessor after tender of the rent, without a fresh demand on the tenant, is illegal; and if the lessor distrains before the rent has become due, the tenant may resist the entry and seizure by force, and after a seizure has been made, he may rescue his goods at any time before they have been impounded; but when once the goods have been impounded, they are in the custody of the law, and the tenant cannot then break the pound and retake them. (*t*) "Tender upon the land before the distress makes the distress tortious; (*u*) tender after the distress and before the impounding makes the detainer and not the taking wrongful; tender after the impounding makes neither the one nor the other wrongful, for then it comes too late, because then the cause is put to the trial of the law to be there determined." (*x*) If a landlord distrains for rent in arrear goods sufficient to satisfy the rent, and wantonly abandons the distress, he cannot lawfully make a second distress for the same rent, although it remains due. (*y*) It is essential also to the lawful exercise of the power of distress that the distrainer be the immediate landlord or owner of the estate and the party entitled to the reversion of the property on the determination of the lease. (*z*) If he has made a lease without having any right or title to grant a lease, or if, after the making of the lease, he has sold the property or transferred his interest to some third party, (*a*) or being himself only a lessee, granting an under-lease,

(*r*) *Coomber v. Howard*, 1 C. B. 440.

(*s*) *Mallam v. Arden*, 3 M. & Sc. 795, 796; 10 Bing. 299, s. c.

(*t*) 1 Inst. 47, b., 161, a.; Gilb. 61. *Ellis v. Taylor*, 8 M. & W. 415.

(*u*) *Hobart, C. J., Cranley v. Kingswell*, Hob. 207; *Abbott, C. J., 3 B. & Ald. 473*; *Tindal, C. J., 3 M. & Sc. 369*; 2 Inst. 507; Gilb. 50.

(*z*) Lord Coke in the *six carpenters'* case, 8 Rep. 147, a. *Firth v. Purvis*, 5 T. R. 432. *Thomas v. Harries*, 1 Sc. N. R. 524. *Ellis v. Taylor*, 8 M. & R. 418.

(*y*) *Dawson v. Cropp*, 1 C. B. 961; 3 D. & L. 225, s. c.

(*s*) Bro. Abr. (Distress) pl. 7, *Parmenter v. Webber*, 8 Taunt. 593; 2 Moore, 656, s. c. *Precoe v. Corrie*, 2 M. & P. 64; 5 Bing. 24, s. c.; Co. Litt. 142, b., 143, a.; 5 M. & R. 157 162. *Wade v. Marsh, Latch*, 211.

(*a*) Bro. Abr. (Dette) pl. 39. 43, Ed. 3, 4. — *v. Coopers*, 2 Wils. 375. *Smith v. Mapleback*, 1 T. R. 441. *Pascos v. Pascos*, 5 Sc. 117; 3 Bing. n. c. 903, s. c.

he has forfeited his estate by some breach or covenant or otherwise, and the superior landlord has entered, and the tenant has attorned to the latter, he has of course no right or power to distrain. (b)

By 8 & 9 Vict. c. 106, it is enacted (s. 9,) that when the reversion expectant upon a lease has been surrendered, or merged, "the estate which shall for the time being confer as against the tenant under the same lease, the next vested right to the same tenements or hereditaments, shall to the extent, and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease."

It has been holden that a tenant from year to year underletting from year to year, has a reversion which enables him to distrain for rent reserved upon such underlease. (c)

If the lease has been put an end to by a surrender of the term, or by a notice to quit, and the tenant, notwithstanding the termination of the demise, continues to hold, with the permission of the landlord as tenant at will, or adversely and against the will of the lord as a wrongdoer, the lessor cannot, it is said, distrain the goods and chattels of the tenant for rent in respect of such occupation. (d) But any slight evidence of a renewal of the tenancy, and of an agreement to hold upon the former terms would be sufficient to justify the landlord in distraining for the old rent. (e)

If the tenant becomes bankrupt, and the assignees decline to take the lease, the lessor is not, in case the bankrupt tenant continues to hold the property, deprived by the bankruptcy and certificate of his right to distrain. (f)

Of the time and place for making a distress.—The tenant has the whole day on which the rent becomes due to pay such rent, and a distress therefore cannot be made until the day after the day appointed for the payment of the rent. (g) A distress, moreover, cannot be made in the night or after sunset, or before sunrise; (h) nor upon land which does not form part or parcel of the demise, and from which the rent reserved does not issue, unless the goods of the tenant have been removed from the demised premises and placed thereon within sight of the lord coming to dis-

(b) *Burns v. Richardson*, 4 Taunt. 720.
Hopcroft v. Keys, 2 M. & Sc. 760; 9 Bing. 618.

(c) *Curtis v. Wheeler*, 1 M. & M. 493.

(d) *Jenner v. Clegg*, 1 M. & Rob. 213. *Alford v. Vickery*, 1 Car. & Marsh. 283.

(e) *Zouch d. Ward v. Willingale*, 1 H. Bl.

811.

(f) *Briggs v. Soverly*, 8 M. & W. 729.

(g) 21 Hen. 6. 40; 14 Hen. 4. 31; Hale, n. 304. Co. Litt. 47 b. *Duppa v. Mayo*, 1 Saund. 287.

(h) Co. Litt. 142, a; Gilb. 50; Parke B., 6 C. & P. 213.

train, or unless they have been fraudulently removed by the tenant to avoid the distress. If, therefore, a tenant enjoys an easement over, or a right to use, the land of a third party, and has, in the *bonâ fide* exercise of such right, placed his goods and chattels on the land of such third party, the lessor has no right to distrain them. Thus, where a wharf on the banks of a tidal river was demised to a tenant at an annual rent, with a right to use part of the bed of the river, between high and low water mark, as a place of deposit for boats and barges resorting to the wharf, it was held that the lessor of the wharf had no right to distrain the barges of the tenant lying on such land and bed of the river alongside the wharf, although they were attached to the wharf by head and stern ropes, inasmuch as the land on which the barges were lying belonged to the crown, and had never been demised to the tenant. (i)

For the same reason a landlord could not, by the common law, distrain the beasts and cattle of a tenant feeding upon a common, and which had been placed there by the tenant in the *bonâ fide* exercise of a right of common vested in him in his own right, or as appurtenant to the land demised to him by the lessor. But this has been altered by 11 Geo. 2, c. 19, s. 8, which empowers landlords to take and seize as a distress for arrears of rent, any cattle or stock of their tenants feeding or depasturing upon any common appendant or appurtenant.

Of the lessor's right to follow and distrain goods and chattels removed from the demised premises.—"If the lord coming to distrain hath a view of the beasts within his fee, and before he can distrain them the tenant chases them into the highway, the lord may distrain them there. (k) If the tenant fraudulently or clandestinely removes goods and chattels from the demised premises to prevent the lessor from distraining them for rent in arrear, the lessor, or his bailiff or agent may, within thirty days next after such removal, take and seize them wherever they may be found, unless they have in the mean time been sold *bonâ fide* to some person ignorant of the fraud. But if it be necessary to break open any door in order to seize such goods, the lessor must call a constable or other peace officer to his assistance, and must force the door in his presence and in the day time. (l) To deter tenants from fraudulently removing their goods to avoid a distress, a penalty to the amount of double the value of the things distrained is imposed upon the offender, (m) which may be reco-

(i) *Buzard v. Capel*, 8 B. & C. 141; 3 M. & P. 494; 6 Bing. 150, s. c. (in error.)
(k) 2 Inst. 232.

(l) 11 Geo. 2, c. 19, s. 7. *Rich v. Woolley*, 5 M. & P. 670; 7 Bing. 651, s. c.
(m) *Back v. Meats*, 5 M. & S. 200.

vered by an action of debt, or, (if the goods do not exceed 50*l.* in value,) by a summary proceeding before two justices. (*n*)

It is not necessary in order to establish a fraudulent removal to prevent a distress, to show that the lessor was about to distrain (*o*) when the goods were carried away, nor that the removal was clandestine: (*p*) if it appears that rent was due at the time of such removal, and that the goods were taken away for the purpose of putting them out of reach of a distress, the removal is a fraudulent removal within the meaning of the statute. (*q*) If no rent was due, (*r*) or there was sufficient distress on the demised premises, independently of the goods removed to satisfy the rent, the removal is not fraudulent, and the lessor cannot consequently follow and distrain the goods. (*s*)

The statute applies solely to the goods of the tenant. If, therefore, a third party, such as a lodger in a house, removes his goods to prevent them from being distrained for rent due from the tenant, such goods cannot be followed and distrained off the demised premises by the lessor. (*t*) The same power of following and distraining goods removed from the demised premises, is accorded to the lessor of realty by the Roman law, the French law, and other systems of jurisprudence founded on the Roman code. (*u*)

What things may be distrained.—Goods and chattels in the custody of the law cannot be distrained for rent, such as goods and chattels in a pound, or goods seized upon a *fi. fa.*, or taken under an attachment and remaining in the possession of a sheriff's officer or bailiff. (*x*) But goods and chattels in the custody of a messenger under a fiat in bankruptcy are not in *custodiâ legis* so as to prevent their being distrained by the lessor. (*y*) If growing crops have been taken in execution and sold by the sheriff, the vendee has a right to the land until the crops are fit to be cut and carried away, and the landlord has no right to distrain such crops for rent accruing due subsequently to the execution and sale, unless the crops after they have come to maturity and have been severed, are allowed

(*n*) *Hornesfall v. Davy*, 1 Stark. 169. *Bromley v. Holden*, Mood & Malk 176.

(*o*) *Stanley v. Wharton*, 10 Pr. 188.

(*p*) *Opperman v. Smith*, 4 D. & R. 33.

(*q*) *Farray v. Duncan*, M. & Malk. 534, 535. *Lister v. Brown*, 3 D. & R. 501. *John v. Jenkins*, 1 Cr. & M. 227.

(*r*) *Rand v. Vaughan*, 1 Sc. 670; 1 Bing. n. c. 767, s. c. *Watson v. Main*, 3 Esp. 15. *Northfield v. Nightingale*, 1 Cr. & M. 230, n.

(*s*) *Parry v. Duncan*, M. & M. 533; 5 M. & P. 22; 8 Bing. 243, s. c.

(*t*) *Thornton v. Adams*, 5 M. & S. 38. *Postman v. Harrell*, 6 C. & P. 227. *Fletcher v. Marillier*, 9 Ad. & E. 461.

(*u*) Pothier Louage, No. 257.

(*x*) Co. Litt. 47; Willes 131; 1 Ventr. 221.

(*y*) per Ld. Hardwicke, 1 Atk. 103, 104. *Briggs v. Sowry*, 8 M. & W. 739.

to remain an unreasonable time upon the demised premises. (z) If, indeed, the execution is irregular or fraudulent, (a) or the sheriff's officer after the seizure of the goods relinquishes the possession and leaves no one in possession of them, then they may be distrained and taken. (b)

Before goods seized by the sheriff under an execution can be removed or sold, the landlord must be paid one year's rent, or the rent for any less period that may happen to be due, (c) provided he gives notice of his claim prior to such sale or removal, (d) or the sheriff is aware of its existence. (e) But there must be an existing tenancy at the time, (f) and the execution must not be an execution put in by the landlord himself. (g) This right of the landlord to a year's rent is confined to executions upon judgments, (h) and private extents, and does not extend to prerogative process, such as an extent in chief or an extent in aid. (i) By 7 & 8 Vict. c. 96, s. 67, "no landlord of any tenement let at a weekly rent shall have any claim or lien upon any goods taken in execution under the process of any court of law, for more than four weeks' arrears of rent, and if such tenement shall be let for any other term less than a year, the landlord shall not have any claim or lien upon such goods for more than the arrears of rent accruing during four such terms or times of payment."

Property of third parties on the demised premises in the possession and use of the owners, and not in the possession or under the charge of the tenant, cannot be distrained for rent. The landlord has no right, for example, to distrain the carriage and horses of a morning visitor standing at the door of the tenant's dwelling house, or under a shed upon the demised premises; or the horse of a stranger who has called at the house on business, and tied up the animal to the gate or the stable door. He cannot distrain a horse which has brought corn to be ground at the tenant's mill, and has been fastened to the mill door whilst the corn was

(z) *Peacock v. Purvis*, 5 Moore, 79; 2 B. & B. 362, s. c. *Wright v. Davies*, 1 Ad. & E. 641; 3 N. & M. 790, s. c. *Parslow v. Cripps*, Com. 204. *Eaton v. Southby*, Willes, 181.

(a) *Smith v. Russell*, 3 Taunt. 400. *St John's College v. Murcot*, 7 T. R. 263.

(b) *Blades v. Arundale*, 1 M. & S. 718.

(c) 8 Anne, c. 14. 1 Archbold's practice, by Chitty, 8th ed. 573—576. *Williams v. Lewsey*, 1 M. & Sc. 92. *Smallman v. Pollard*, 7 Sc. N. B. 911; 6 M. & Gr. 1001. *Riesley v. Ryle*, 11 M. & W. 16. As to the party entitled to make the claim as the immediate landlord, see *Bennett's case*, 2 Str. 786. *Thurgood v. Richardson*, 5 M. & P. 270; 7 Bing. 428, s. c. *Colyer v. Spear*, 4 Moore, 478. *Forster v. Cookson*, 1 Ad. & E. n. s. 419. *Clarke v. Lord*, 2 Dowl. 55,

227. *Haythorn v. Bush*, ib. 641. *Harrison v. Barry*, 7 Pr. 690.

(d) *Waring v. Dewberry*, 1 Str. 97. *Palgrave v. Windham*, ib. 212. *Arnitt v. Garnett*, 3 B. & Ald. 440. *Smith v. Russell*, 3 Taunt. 400, ex parte *Descharmes*, 1 Atk. 103. And if the goods on the premises are not sufficient to satisfy a year's rent, the sheriff must withdraw. *Forster v. Hilton*, 1 Dowl. 36. *Calvert v. Joliffe*, 2 B. & Ad. 419.

(e) *Andrews v. Dixon*, 3 B. & Ald. 645.

(f) *Hodson v. Gascoigne*, 5 B. & Ald. 88.

(g) *Taylor v. Lanyon*, 4 M. & P. 816; 6 Bing. 536, s. c. *Lee v. Lopes*, 15 East, 230.

(h) *Branding v. Barrington*, 9 D. & R. 617.

(i) *The King v. De Caux*, 2 Fr. 17. *The King v. Hill*, 6 Pr. 19.

being ground to be taken back ; nor a horse which has brought yarn to a private beam belonging to the tenant to be weighed, and has been placed in a stable on the demised premises whilst the weighing was accomplished, the horse in each of these cases being in the possession, and use, and under the control of the owner or his servant. (*k*) Neither can the landlord distrain the boat or barge of a third party, lying in a private dock, or private canal, or alongside a wharf upon the demised premises, provided such boat or barge is in the hands and under the care of the master and crew of the owner, and is at the time employed in the owner's business, and is in his use and possession, and not in the use and possession, nor under the control of the tenant ; (*l*) if indeed it is abandoned and left upon the demised premises in the possession, or use, or under the care of the tenant or his servants, then it is distrainable. (*m*)

The goods and chattels, and wearing apparel of a guest in the tenant's house, in the actual possession and use of such guest, cannot be distrained for rent, whether the house in which the guest is lodged is a private dwelling-house or a common inn. (*n*)

The goods and chattels also of third parties placed upon the demised premises in the possession and under the care of the tenant, in the ordinary course of trade, are exempt from distress. Thus the goods and chattels, horses and carriages of travellers, deposited in hostelries and public stables, (*o*) or in a market or fair, where things are taken to be bought or sold, (*p*) or goods delivered to a carrier to be carried for hire. (*q*) The horse in the smith's shop shall not be distrained for the rent issuing out of the shop, nor the horse, &c., in the hostry, nor the materials in the weaver's shop for the making of cloth, nor cloth or garments at a tailor's, nor sacks of corn, nor meal in a mill, nor in a market, for it is in custody (protection) of law." (*r*) This exemption in favour of trade has in modern times been extended to the yarn of a stocking manufacturer, placed in the house of the tenant, a stocking weaver, to be woven into stockings ; (*s*) to the silk of a velvet manufacturer, delivered to the tenant, a silk weaver, and taken home by him to be made into velvet, at his own house ; (*t*) to

(*k*) *Owen, J., Rade v. Burley*, Cro. Eliz. 596.
Muspratt v. Gregory, 3 M. & W. 679.

(*l*) *Muspratt v. Gregory*, 1 M. & W. 646, 658, 660.

(*m*) *Ib.* 633. 3 M. & W. 677, a. c.

(*n*) 7 Hen. 7, 1 b. Bro. Abr. 251, pl. 70.

(*o*) Bro. Abr. (Distress) pl. 57 ; 1 Roll. Abr. 638, pl. 12.

(*p*) 7 Hen. 7, 1 b. Bro. Abr. (Distress) pl. 57.
Crosier v. Tomkinson, 2 Ken. 439.

(*q*) *Gisbourn v. Hurst*, 1 Salk. 249.

(*r*) Co. Litt. 47, a. *Stuffe mise au tailor, fuller, shere-man, weaver, miller et hujusmodi ne seront distreine car ceux artificiers sont pour le common weale.* Bro. Abr. Distress, fol. 251, pl. 70. *Mon toje en le shop d'un taylor ne peut estre distrain, nec mon cheval en un hosterie, nec mon cheval en le shop d'un ferror, que est la d'etre fer, car la ley done liberte a mister mes biens la.* Rolle Abr. fol. 668, pl. 12.

(*s*) *Wood v. Clarke*, 1 Cr. & J. 484.

(*t*) *Gibson v. Ireson*, 3 Ad. & E. n. s. 39.

bullocks sent to a slaughterer, or carcase butcher, to be slaughtered and cut up in the way of his trade, and sent back in joints to the owner to be sold or consumed ;(u) to corn sent to a miller to be ground ; (x) to old clothes sent to a tailor's ; casks sent to a cooper's, or boats to a boat-builder, to be repaired ;(y) goods sent to a weigher to be weighed,(z) or to an auctioneer, commission agent, factor, warehouseman, wharfinger, or other agent, to be sold or exported, or otherwise to be dealt with in the course of trade.(a) "The principle of the exemption," observes Parke, B., "is the public good: that is, that all men may freely, and without interruption or danger of the loss of their goods, deal with those who carry on trades or businesses for the benefit of all, indiscriminately ; or buy or sell in fairs or markets, and thus supply themselves with the commodities of life The ground of the exemption is not that the goods are to be worked up or managed, but that they are necessarily to be placed on the premises of the trader, in the way of his trade, if that trade is to be made available to the public."(b) If the trade can be carried on with profit and advantage without the things being left on the demised premises in the custody and possession of the tenant, they are not there *ex necessitate*, and are consequently distrainable. Thus it has been held that if a brewer's casks be left with a publican until the beer is consumed, the casks do not fall within the exemption, and are not privileged from distress, inasmuch as it is in nowise essential to the carrying on the trade of the publican that the brewer should find the casks.(c) So, if the barge of a purchaser of salt is left at the salt-works in the possession of the vendor of the salt, it is distrainable for rent, inasmuch as "it is not necessary for the protection of trade that the boat should be delivered into the custody of the person manufacturing and selling salt. The trade may well be carried on at the salt works without the possession of the boat being at all parted with by the owner."(d) Upon the same principle it has been holden that a farmer's cart which has brought malt to a brewer, and has been left in the brewer's yard in the possession and under the charge of the brewer, or his servant, to be loaded with a return cargo of grains, or beer, is distrainable for the rent of the brewing premises.(e) If a carriage

(u) *Brown v. Shevill*, 2 Ad. & E. 138.

(x) Cro. Eliz. 596. Bac. Abr. DISTRESS. (B.)

(y) per Ld. Abinger, 7 M. & W. 465 ; 1 M. & W. 660, 661.

(z) *Read v. Burley*, Cro. Eliz. 596.

(a) *Findon v. M'Laren*, 6 Ad. & E. n.s. 891. *Adams v. Grane*, 1 C. & M. 380. *Gilman v. Eiton*, 6 Moore, 243 ; 3 B. & B. 75,

s. c. *Thompson v. Mashiter*, 8 Moore, 254 ; 1 Bing. 283, s. c. *Matthias v. Menard*, 2 C. & P. 353.

(b) Parke B., 1 M. & W. 652, 657.

(c) *Joule v. Jackson*, 7 M. & W. 451.

(d) *Alderson, B., Muspratt v. Gregory*, 1 M. & W. 646 ; 3 M. & W., 677.

(e) per Cur. 3 M. & W., 681.

which has been sent to a coachmaker to be repaired is left on the premises after the repairs have been completed, for purposes foreign to the trade of a coachmaker, it is distrainable, (f) unless the coachmaker exercises some other trade thereon, and the carriage is left with him for the purpose of being dealt with by him in the exercise of such trade. If he exercises the trade of a commission agent for the sale of coaches and carriages, as well as the trade of a coachmaker, and the carriage is left with him to be sold, it would then come within the principle of the exemption. (g) It has been held that a carriage standing at livery is distrainable. (h) Whenever a chattel found upon the demised premises has been lent or let by the owner to the tenant, it is distrainable if it is not in actual use at the time of the levying of the distress. (i) There is a decision to the effect that cattle on their way to market in charge of a drover, and turned into a close on the demised premises in the night, are distrainable; (k) but this decision appears to be directly at variance with numerous authorities, and with the principles established for the benefit of trade, and cannot now be considered law. (l) Independently of the exemption in favour of trade, "the cattle may reasonably be considered as having continued in the possession of the drover," (m) and if so, they are not distrainable on this ground alone. And whenever the landlord's permission to place cattle upon the demised premises, for a temporary purpose, has been asked and obtained, and the beasts are placed thereon with the express authority of the lessor, the latter cannot afterwards distrain them without giving notice to the owner of the withdrawal of his consent. The landlord in such a case impliedly undertakes not to exercise his power of distress, as by so doing he would be guilty of a direct fraud. (n) And, lastly, it has been enacted and declared by 7 Anne, c. 12, s. 3, on grounds of public policy that process of distress against the goods of any ambassador, or other public minister of a foreign state, or of his domestic servants, shall be void.

Goods and chattels of the tenant privileged from distress.—Goods and chattels, and articles of produce of a perishable nature, have always been considered to be unfit to be taken and detained as a pledge for rent, inasmuch

(f) *Shepherd v. Cafe*, 5 C. & P., 418.

(g) *Findon v. M'Laren* 6 Ad. E. n. s. 891.

(h) *Francis v. Wyatt*, 3 Burr. 1498; 1 W. Bl. 483; 3 M. & W. 681. *Adams v. Grane*, 1 Cr. & M. 381.

(i) *Fenton v. Logan*, 3 M. & Sc. 32. *Gorton v. Falkner*, 4 T. R. 565.

(k) *Fowkes v. Joyce*, 3 Lev. 260. 2 Ventr.

50. Latw, 1161.

(l) *Tate v. Glead*, 2 Saund. 290, a 2. Christian's Bl. Com. 8 n. 4. *Nugent v. Kirwan*, 1 Jebb & Symes, Irish, Q. B. Rep. 97. Bayley, J., *Adams v. Grane*, 1 C. & M. 387. *Findon v. M'Lane*, 6 Ad. & E. n. s. 891.

(m) per Cur. 1 M. & W. 681, 682.

(n) *Joyce v. Fowkes*, 2 Vern. 129. *Horsford v. Webster*, 1 C. M. & B. 696; 1 Gale, 1, a. c.

as they are liable to a rapid deterioration, and cannot be restored to the tenant in as good plight as they were in when taken, within the period allowed by law for their redemption. Therefore, fruit, milk, and other things of a perishable nature could not be distrained; "but as the statute 2 W. & M., c. 5, s. 3, directs the distress to be sold within five days unless replevied, perhaps the ancient rule of the common law, with respect to the perishable nature of the distress no longer extends, in the case of a distress for rent, to any thing which is not liable to deterioration within the period prescribed by the statute for the sale of it. (o) As the things distrained were regarded at common law in the light of a pledge to be returned to the tenant when the rent was paid, it was held that money could not be distrained unless in a bag, because the identical pieces could not be known and restored; and that grain or flour could not be taken out of a sack, or hay from a barn, because it could not well be ascertained whether the identical quantity taken had been rendered back again. Corn in the sheaf was not distrainable unless it were found in a cart in which it could be removed without injury or loss; nor growing corn, grass, fruits, hops, roots, and growing produce, as it was attached to the freehold, and could not be taken up and returned to the tenant in case he chose to redeem the pledge in the same state and condition as it was in when removed. (p) But the acts of 2 W. & M., c. 2, s. 3, and 11 Geo. 2, c. 19, s. 8 & 9, now enable the lessor to distrain loose corn and corn in the sheaf; (r) straw and hay, growing corn, grass, hops, roots, fruits, pulse, and growing produce generally. These acts, however, do not extend to trees, shrubs and plants growing in nursery gardens, nor to money.

Tenants' fixtures annexed to the freehold by nails and permanent fastenings, such as furnaces, cauldrons, chimney-pieces, kitchen-ranges, stoves, coppers, grates, blinds, &c. &c., are not distrainable, as they cannot be removed and restored without sustaining some injury. (s) But if they are attached to the freehold by bolts and screws, so as to be movable, they may be distrained and taken. (t) A millstone in a mill, and an anvil in the smith's shop cannot be distrained for rent, although the anvil be removed out of the stock, or the millstone out of the socket to

(o) *Bradby on Distress*, 213, ed. 1808.

(p) 1 Rolle Abr. 667. *Bradby on Distresses*, 213; Gilbert, 32.

(r) *Clark v. Gaskarth*, 2 Moore, 491. *Clark v. Calvert*, 3 Moore, 114, 115.

(s) Co. Litt. 47, b. *Niblett v. Smith*, 4 T. R.

504. *Abbott C. J.*, 4 B. & Ald. 207. *Darby v. Harris*, 1 Ad. & E. n. s. 898, 899. *Dalton v. Whitten*, 3 Ad. & E. n. s. 961; 3 G. & D. 71, a. c.

(t) *Garrow, B.*, *Duck v. Braddly*, 1 M. & Cl. 234.

be picked, for the anvil is accounted part of the forge, and the mill-stone part of the mill, though it is not, when taken, actually fixed to the freehold. (u)

Things conditionally exempt.—Beasts of the plough, implements of husbandry, and the tools and instruments of a man's trade or profession—such as the books of the scholar, the axe of the carpenter, the anvil of the smith, (x) the stocking-loom of the weaver, (y) the thrashing machine of the farmer, are privileged from distress so long as they are in actual use, (z) or there are other goods on the demised premises sufficient to satisfy the rent without them. Sheep, in common with beasts of the plough, share in this latter exemption by express legislative enactment. By 51 Hen. 3, stat. 4, it is provided that no man of religion, nor other person shall be distrained by his beasts that profit his land, nor by his sheep, by the king's or other bailiffs, so long as they can find other distress or other chattels sufficient for the levying of the distress. (a)

What amounts to a distress for rent.—It is not necessary in order to make a distress for rent, that the lessor, or his agent, should take corporal possession of the things intended to be distrained. It is sufficient if the lessor in person, or by deputy, enters upon the demised premises and announces the distress to the tenant, or his servants, or the persons in actual occupation of the property. Thus when a stranger was about to remove some goods he had deposited on the demised premises, and the lessor, hearing of his intention, came upon the land and declared that he would not suffer the things to be removed until his rent was paid, and then went away, and in the course of the day sent in a broker who made a formal distress, but in the mean time the stranger had removed his property off the demised premises, it was held that the distress was commenced by the landlord's entry and declaration, and that the landlord was justified in retaking the goods at the place to which they had been removed. (b) So where the landlord's agent entered upon the demised premises in the absence of the tenant, and told the servants of the latter that he was come to distrain for rent, and walked round the premises, took an inventory and left this inventory at the dwelling house, with a notice of

(u) Bro. Abr. (Distress) pl. 23; 14 Hen. 8, fol. 25, pl. 6.

(x) 14 Hen. 8, f. 25, pl. 6; Co. Litt. 47, a. *Davies v. Aston*, 3 D. & L. 189.

(y) *Watts v. Davis*, 1 Selw. N. P. 676. *Simpson v. Hartopp*, Willes, 512. *Smith's Lead. Cas.* 187—194. *Harvey v. Pocock*, 11 M. & W. 740. *Wood v. Clark*, 1 Cr. & J. 484.

(z) 14 Hen. 8, fol. 25, pl. 6. *Storey v. Robin-*

son, 6 T. R. 138. *Wagstaff v. Clark*, Woodfall, 326. *Roberts v. Jackson*, Peake's Ad. Cas. 36.

(a) Growing crops not being immediately available, do not prevent the landlord from distraining beasts of the plough. *Piggott v. Birtles*, 1 M. & W., 441, 442.

(b) *Wood v. Nunn*, 2 M. & P. 30, 31; 5 Bing. 10, a. c.

distress addressed to the tenant, informing him that he had distrained the goods mentioned in the inventory for rent due to his landlord, it was held that the distress was completed and accomplished by these acts of the agent, and that the subsequent departure of the latter without leaving any one in possession of the things distrained was not an abandonment of the distress. (c) And where the agent of the lessor went into a field forming part of the demised premises where the tenant's cattle were grazing, and placing his hand upon one of the beasts, declared that he distrained the whole of them for the rent then due, it was held that this was an actual levying of a distress on all the cattle in that particular inclosure. (d)

The tenant is entitled to recover damages for the wrongful distress, although he had the free use of the goods all the time they were in the constructive custody of the law. (e)

Impounding and securing the goods.—The landlord may now impound the things distrained in any barn or building, hovel or rick, or on any fit part of the demised premises. (f) No formal impounding is required as in ancient times, in order to remove the goods from the possession and control of the tenant, and place them in the custody of the law. As soon as the distrainer has made out and delivered to the tenant, or has left upon the premises an inventory of the goods he has taken, they are impounded within the meaning of the statute. Thus, where the landlord distrained four casks of beer in a cellar, and gave the usual notice of the distress to the tenant, and left the casks where he found them in the cellar, without placing them under lock and key, or leaving any person in charge of them, it was held that the casks were duly impounded. (g) So where cattle which had been distrained for rent were left in a field on a farm where they were taken, and the gates of the field which had been properly secured by the broker who levied the distress were opened, and the beasts taken out and driven away, it was held that this was a pound-breach rendering the party who committed the act liable to treble damages under the statute. (h) And if the distrainer enters and makes a general announcement of the distress on one day, and follows up the proceeding on the next, by giving the tenant notice of the particular things distrained and taken, the impounding is complete at all events from the time of such notice. (i)

(c) *Swann v. Earl Falmouth*, 8 B. & C. 456; 2 M. & R. 534.

(d) *Thomas v. Harries*, 1 Sc. N. R. 524.

(e) *Bayliss v. Fisher*, 7 Bing. 153; 4 M. & P. 790.

(f) 2 Wm. & M. sess. 1, c. 5; 11 Geo. 2, c. 19, s. 10.

(g) *Firth v. Purvis*, 5 T. R. 432.

(h) *Castleman v. Hicks*, Car. & Marsh. 266.

(i) *Thomas v. Harries*, 1 Sc. N. R. 524, 535.

Formerly the distrainer, in removing the goods distrained, might have removed them to any place he thought fit for the purpose of impounding them, but the statute of Marlbridge prohibits the distrainer from driving the distress out of the county in which it is taken, and by 1 & 2 Ph. & M. c. 12, s. 1; it is enacted that no distress of cattle shall be driven out of the hundred, rape, wapentake, or lathe in which it has been taken, except it be to a pound overt within the same shire not above three miles distant from the place where such distress was taken, and that no cattle or goods distrained shall be impounded in several places, whereby the owner shall be constrained to sue several replevies for the delivery of the distress so taken at one time, on pain of forfeiture of one hundred shillings and treble damages.

If the distrainer uses or consumes for his own private use things distrained and impounded; if he draws beer out of a barrel,^(k) tans hides,^(l) or uses or works beasts or cattle,^(m) he of course subjects himself to an action for damages at the suit of the owner thereof.

Pound breach.—As soon as the goods are impounded they are in the custody of the law, and the tenant cannot retake them without being guilty of pound breach, and subjecting himself to an indictment,⁽ⁿ⁾ and also to an action for treble damages and costs of suit,^(o) although the distress may be wrongful or irregular, and no rent may be in arrear or due.^(p) If the pound is broken, and the goods are taken away, the landlord may follow after them and recapture them, but he must not break open the doors of a private house or private stable or inclosure, nor enter the grounds of a third party for the purpose of retaking the goods, except it be on fresh pursuit.^(q)

REPLEVIN for a wrongful distress.—As the things distrained were originally regarded merely as a pledge for the payment of the rent, it was thought that one pledge was as good as another, and that the end and object of the distress would be as well answered by sufficient sureties for the payment of the rent as by the retention of the distress itself. The law, therefore, permitted the tenant to have back the things distrained, provided he substituted another sufficient pledge in lieu thereof, and gave security to the sheriff of the county in which the distress had been taken

(k) *Dod v. Monger*, 6 Mod. 216.

(l) *Duncomb v. Green*, Cro. Eliz. 783.

(m) *Post*, ch. 25, s. 1.

(n) *Rex v. Bradshaw*, 7 C. & P. 233.

(o) 2 Wm. & M. sess. 1, c. 5, s. 4; 11 Geo. 2, c. 19, s. 10. *Firth v. Purvis*, 5 T. R. 432. *Car-*

leman v. Hicks, Car. & Marsh. 266.

(p) Co. Litt. 47 b. *Cotsworth v. Betison*, 1 Raym. 104. *Parrett Nav. Co. v. Stower*, 6 M. & W. 564.

(q) *Rich v. Woolley*, 5 M. & P. 675; 7 Bing. 651, s. c.

for the prosecution of his complaint against the distrainer for the unlawful taking and detainer of the chattels.(*r*) The proceeding by which this was effected, was called a replevin, or the substitution of one pledge or security in the place of another.(*s*) The tenant whose goods had been distrained, sued out a writ directed to the sheriff, commanding him to replevy the goods which were alleged to have been taken and unlawfully detained, and to do justice between the parties in the matter, that no more complaint might be heard for want of justice.(*t*) But as the suing out of this writ from the High Court of Chancery occasioned great delay and injury to persons resident in the more distant parts of the kingdom, the sheriff was by the statute of Marlbridge (52 Hen. 3, c. 21) authorized to replevy beasts on his own authority without the writ of replevin, on complaint being made to him of the wrongful taking and detainer. The tenant is entitled to replevy the goods distrained at any time before they are actually sold,(*u*) and for this purpose he must attend at the office of the under-sheriff of the county, or one of the deputy sheriffs appointed to receive replevins,(*x*) and there tender his sureties, and enter into the required bond, and the under-sheriff or deputy-sheriff is then bound to make out his precept for the delivery and restoration of the distress to the owner. (*y*)

Notice of the distress and inventory of the goods distrained.—If, after the levying of the distress, the goods are removed from the demised premises to be impounded, notice of the distress and of the place where the goods are impounded must be given to the lessee. And if the goods are impounded on the demised premises, the landlord must give the lessee distinct notice of the things included in such distress, in order that the tenant may know what he is to replevy in case he wishes to have back the goods and to dispute the legality of the seizure. And for this purpose, as soon as the distress is made, whether by the lessor or his bailiff, an inventory of the goods distrained should be made and served upon the lessee, together with the notice of the distress. The notice of the distress must contain an accurate statement of the amount of rent distrained for, and of the particular things taken. If the rent stated in the notice exceeds the amount that was then due, the distress is an illegal distress,

(*r*) As to the form and interpretation of replevin bonds, see *Jackson v. Hanson*, 8 M. & W. 477.

(*s*) REPLEGIARE est rem apud alium detentam, cautione legitimâ interpositâ redimere. Et cautio hæc est stipulatio in forma juris adhibita de stando juri et sistendo se foro; dictum autem replegiare quasi revndiare, hoc est vadium vel pignus unum loco alterius suggerere et constituere.

Spelman, Gloss. 485.

(*t*) Fitz. N. B. 68.

(*u*) *Jacob v. King*, 5 Taunt. 451. *Griffiths v. Stephens*, 1 Chitt. 196; 1 Marsh. 135.

(*x*) 13 Ed. 1, stat. 1, c. 2; 11 Geo. 2, c. 19, s. 23.

(*y*) *Bract*. lib. 4, fol. 156—159. As to the proceedings in replevin, see *Bac. Abr. Replevin*; *E. Gilb.*; *Arch. Land. & Tent.* 286—302; *Arch. Pr.* 973.

although the value of the things taken falls short of the rent actually due, and such wrongful taking and detainer cannot be cured by a second notice stating the amount due. Thus, where the lessor gave notice to the lessee that he had distrained for 165*l.* 2*s.* 8*d.* rent in arrear, when the actual amount of rent due was only 80*l.* 2*s.* 3*d.*, it was held that an action was maintainable against the lessor for the wrongful distress, although the value of the goods taken was under 80*l.*, and the lessor, before selling them, had served a second notice on the tenant, stating the true amount of rent in arrear, and that the distress was taken for that amount only, and would be sold unless that amount was paid or the property replevied. (z) The notice must also contain a correct enumeration of the things distrained; for if the landlord removes and sells goods and chattels which were not included in the inventory and notice, and which have not consequently been comprised in the distress, he is liable to an action for damages at the suit of the tenant. (a)

Appraisement and sale of the distress.—If the tenant, within five days after he has received notice, neglects to repay the same, the lessor or distrainer may, with the assistance of the sheriff or under-sheriff of the county, or a constable of the hundred or parish, cause the goods and chattels distrained to be appraised by two sworn appraisers, and may afterwards sell them for the best price that can be got for them, and apply the purchase-money in discharge of the rent and the costs of the sale, (b) leaving the overplus, if any, in the hands of the said sheriff, under-sheriff, or constable, for the owner's use.

The schedule of the stat. 57 Geo. 3, c. 98, regulating the costs of appraisements, "whether made by one broker or more," refers only to the case of the employment of a single appraiser by consent, and does not dispense with the attendance of the two sworn appraisers required by the statute. (c) If the broker or person actually making the distress on behalf of the landlord constitutes himself one of the appraisers, the appraisement is wrongful and irregular. (d)

If the tenant holds under a covenant not to carry hay or straw off the demised premises, the landlord who has distrained hay and straw may sell it, subject to a condition that the purchaser shall consume it on the land. (e)

(z) *Taylor v. Henniker*, 12 Ad. & E. 491, 492.

(a) *Bishop v. Bryant*, 6 C. & P. 484.

(b) 2 Wm. & M. sess. 1, c. 5. *Piggott v. Birtles*, 1 M. & W. 448.

(c) *Allen v. Flicker*, 10 Ad. & E. 640. *Bishop v. Bryant*, 6 C. & P. 484, overruling

Fletcher v. Saunders, 1 Mood. & Rob. 375.

(d) *Westwood v. Cowne*, 1 Stark. 172; Bull, N. P. 81.

(e) *Abbey v. Petch*, 8 M. & W. 419. *Fruisher v. Lee*, 10 M. & W. 709.

If the lessor intends to exercise the power of sale given him by stat. 11 Geo. 2, c. 19, s. 8, over the growing produce of the land, he must give the tenant notice of the particular crops distrained, and as soon as the crop has come to maturity, and has been out or gathered, and deposited in a barn or other proper place of deposit pursuant to the act, the lessor must, within the space of one week thereafter, give to the tenant, or leave at the last place of his abode, notice of the place where such crop and chattels so severed from the freehold are deposited, and at the expiration of five days from the giving of such notice, he may appraise and sell the same in the usual way, if the tenant has not in the meantime paid or tendered the whole rent *then* in arrear. (*f*)

Goods followed and distrained after a fraudulent removal, or whilst depasturing on commons appendant or appurtenant, may be sold in the same manner as if they had been distrained on the demised premises. (*g*)

If goods are distrained and sold when no rent is due or in arrear, the distrainer is liable to an action for the recovery of double the value of such goods. (*h*)

Costs and expenses of the distress.—By 57 Geo. 3, c. 93, it is enacted, that no person making any distress for rent under 20*l.* shall take or receive out of the produce of the things distrained and sold any more than the following costs and charges: *i. e.*, for levying the distress, 3*s.*; for the man in possession, 2*s.* 6*d.* per day; for the appraisement, 6*d.* in the pound, with the amount of the stamp; for advertisements, 10*s.*; for catalogues, sale, and commission, and delivery of goods to the purchaser, 1*s.* in the pound on the net produce of the sale. If more costs and charges are levied than those allowed by the act, the party aggrieved has a summary remedy before two justices for treble the amount of the charges, or he may bring an action for the recovery of them; but it is provided (s. 4) that no judgment shall be given against the landlord for such treble costs, unless he has personally levied the distress. Every broker or other person who shall make and levy any distress is to give a copy of his charges, and of all the costs and charges of the distress signed by him, to the person on whose goods and chattels any distress shall have been levied, although the rent demanded may exceed the sum of 20*l.* (*i*) When the rent distrained for exceeds 20*l.*, the costs are not limited to any

(*f*) *Owen v. Legh*, 3 B. & Ald. 470. *Proudlove v. Twemlow*, 1 C. & M. 326. *Biggins v. Goode*, 2 C. & J. 364.

(*g*) 11 Geo. 2, c. 19.

(*h*) 2 Wm. & M. sess. 6, c. 5, s. 2. *Lockier*

v. Paterson, 1 C. & K. 271; Arch. Land. & Tent. 303. *Masters v. Farris*, 1 C. B. 716.

(*i*) *Hart v. Leath*, 1 M. & W. 560; 1 & 2 Ph. & M., c. 12, s. 2. *Child v. Chamberlain*, 5 B. & Ad. 1049.

particular amount or fixed scale of charge; but they must be fair and reasonable. (*l*)

Excessive distresses.—If the lessor distrains goods and chattels beyond what is reasonably and fairly necessary for the purpose of realizing the rent and expenses, the distress is an excessive distress, and he renders himself liable to an action for damages at the suit of the lessee. (*m*) If he distrains the crops growing in two fields when the crop growing in one would be sufficient when at maturity to satisfy the rent and charges, the distress is an excessive distress. (*n*) But it is not for every trifling excess that an action is maintainable; it must be disproportionate to some considerable extent. And “if there is but one thing which can be taken, so that it must be taken or the party must go without his distress for taking it no action lies, though it much exceeds the sum for which the distress is taken” (*o*)

The action may be brought by a lodger or under-tenant whose goods have been taken as well as by the lessee himself; (*p*) and if the lessee, after the distress, enters into an agreement with the landlord respecting the sale and disposition of such distress, or authorizes him to dispense with some or all of the usual forms preparatory to a sale, he does not thereby waive or abandon his right of action for the excessive distress. (*q*)

Of the action for USE AND OCCUPATION.—To obviate difficulties that sometimes occurred in the recovery of rents by action, when the demises were not by deed, it has been enacted, by 11 Geo. 2, c. 19, s. 14, that it shall be lawful for a landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the defendant in an action on the case for the use and occupation of what was so held or enjoyed, and if in any evidence on the trial of such action any parol demise, or any agreement (not being by deed) whereon a certain rent is reserved shall appear, the plaintiff in such action shall not, therefore, be non-suited, but may make use thereof as an evidence of the quantum of damages to be recovered.”

To charge a party in an action for use and occupation, it must be proved either that he held under a demise not under seal; or that he actually occupied, or that there has been an occupation by some other

(*l*) *Lyon v. Tomkies*, 1 M. & W. 608.

(*m*) 52 Hen. 3, c. 4. *Wells v. Moody*, 7 C. & P. 59. *Holland v. Bird*, 3 M. & Sc. 363; 10 Bing. 15, s. c. *Yates v. Tearle*, 6 Ad. & E., n. s. 282.

(*n*) *Piggott v. Birles*, 1 M. & W. 441. As to the implied promise by the lessor to indemnify his own bailiff or servant executing the

distress when such distress is illegal. *Toplis v. Grane*, 7 Sc. 620.

(*o*) Per Lord Ellenborough, *Field v. Mitchell*, 6 Esp. 71, 72.

(*p*) *Fisher v. Algar*, 2 C. & P. 374.

(*q*) *Willoughby v. Marshall*, 4 D. & B. 539; 2 B. & C. 821, s. c.

parties standing in such a relation to him that their occupation is his, and that he is personally liable for it. (r) An actual personal occupation is not necessary to sustain the action when there is a written contract of demise for a term not exceeding three years, as the lessee "holds" within the words of the statute, although he does not occupy; and "if there is an actual *holding*, and the power to occupy and enjoy is given by the landlord to the tenant, so far as depends on the landlord, the action for use and occupation is maintainable." (s) But it is otherwise if there is no written contract of demise between the parties, and no actual occupation or enjoyment. (t)

The lessor may, in this form of action, recover rent agreed to be paid on a written demise, although the premises have become dilapidated and uninhabitable, or have been destroyed or injured by fire, and the tenant has been obliged to quit them. (u) Also the rent or compensation reserved or agreed to be paid for the working of a mine, (x) and compensation for the actual enjoyment of an incorporeal hereditament. (y) The compensation accrues *de die in diem*, so that if there is no express contract for the payment of rent at specific periods, the lessor is entitled to be paid from day to day so long as the occupation lasts. (z)

Very slight circumstances, such as entry on the land, the putting up a notice or advertisement; sending a woman to clean windows or rooms, or workmen to put up paper, or do repairs, will suffice to establish the fact of *actual* occupation. (a)

An occupation by an undertenant of the lessee against the will of the latter is the lessee's own occupation as much as if he was himself personally present upon the land. (b) But if one of two joint lessees holds over after the expiration of his lease, without the assent of his co-lessee, the latter is not responsible in respect of the occupation of such co-lessee. (c)

(r) *Bull v. Sibbs*, 8 T. R. 327. *Waring v. King*, 8 M. & W. 574.

(s) *Tindal, C. J., Ison v. Gorton*, 5 Bing. N. C. 507; 7 Sc. 547. *Erekin, J., Smith v. Twoart*, 3 Sc. N. R. 174; *Gibbs, C. J., 5 Taunt. 519. Pinero v. Judson*, 3 M. & P. 497; 6 Bing. 206, s. c. *Woolley v. Watling*, 7 C. & P. 610. *How v. Kennett*, 3 Ad. & E. 665; 5 N. & M. 1, s. c. *Gregory v. Badcock*, 2 Smith, 18.

(t) Ante, 93, 94. The occupation of the wife before marriage is not the occupation of the husband. *Richardson v. Hall*, 3 Moore, 307; 1 B. & B. 50, s. c.

(u) *Baker v. Holtspeffel*, 4 Taunt. 45. *Ison v. Gorton*, 7 Sc. 507. *Surplice v. Farnsworth*,

3 Sc. N. R. 307; 7 M. & Gr. 579, s. c.

(x) *Jones v. Reynolds*, 4 Ad. & E. 805; 7 C. & P. 335, s. c.

(y) *Bird v. Higginson*, 2 Ad. & E. 696; 4 N. & M. 505.

(z) *Packer v. Gibbins*, 1 Ad. & E., n. s. 421. *Kirkman v. Jarvis*, 7 Dowl. 678.

(a) *Sullivan v. Jones*, 3 C. & P. 579. *Smith v. Towart*, 2 M. & Gr. 841.

(b) *Harding v. Crathorn*, 1 Esp. 57. *Ibbe v. Richardson*, 9 Ad. & E. 849; 1 P. & D. 618, s. c. *Christy v. Tancred*, 9 M. & W. 438.

(c) *Christy v. Tancred*, 9 M. & W. 448; 12 M. & W. 323. *Draper v. Crofts*, 15 Law J., n. s., Exch. 92.

The actual possession and use by one of two executors of property holden on lease by their testator is not in law a possession and use by both, and does not render both chargeable as joint occupiers in their own right. (*d*) If a lessor sells or transfers his legal estate and interest in the demised premises to a third party, and the lessee receives notice of the transfer, and is required to pay his rent to the transferee, and refuses, he is liable to an action for use and occupation at the suit of the latter. (*e*)

The defendant may show that the plaintiff's interest in the premises has expired or has been transferred to some third party, but he is estopped from denying the lessor's original title to grant the property to be enjoyed, (*f*) and cannot show that he has only the equitable estate, or that he is entitled only as co-executor with others who do not join in the action. (*g*)

The courts will not, it is said, try a doubtful title in this form of action. (*h*)

If a tenant has occupied land under a corporation, and paid rent to the corporate body, he may be made liable in an action for use and occupation, although the corporation cannot in general contract, except by virtue of its common seal. (*i*) If a man is let into possession under an agreement for a lease to be granted at a future time, and occupies and receives the profits of the land, he is liable in this form of action for reasonable compensation to be paid to the owner for the use and enjoyment of the property. If a man takes possession of property as a purchaser, under a contract of purchase and sale, and the vendor is unable to make out a title, and the bargain consequently goes off, the purchaser is not in general bound to pay any compensation or remuneration to the owner for the temporary occupation and enjoyment of the property. (*j*) But if, after a contract of purchase and sale has gone off, or been abandoned, the intended purchaser continues to occupy and take the rents and profits of the land, by the sufferance and permission of a party who is then entitled to the immediate possession, he is bound to pay a reasonable compensation to such party for the permissive use and occupation of the property. (*k*) So if the vendor of a house continues to reside in it after he has sold it, he is

(*d*) *Nation v. Toser*, 1 C. M. & E. 175; 4 Tyr. 561, s. c.

(*e*) *Lumley v. Hodgson*, 16 East, 104. *Birk v. Wright*, 1 T. E. 388. *Rennie v. Robinson*, 7 Moore, 589.

(*f*) *Phelps v. Sculthorpe*, 1 B. & Ald. 50.

(*g*) *Dolby v. Hes*, 11 Ad. & E. 335; 3 P. & D. 287.

(*h*) *Woodfall*, 627.

(*i*) *Mayor of Stafford v. Till*, 12 Moore, 260; 4 Bing. 75.

(*j*) *Kirtland v. Pownsett*, 2 Taunt. 145. *Winterbottom v. Ingham*, 14 Law J., n.s. (Q. B.) 298, 800. *Haerne v. Tomlin*, Peake, 253.

(*k*) *Howard v. Shaw*, 8 M. & W. 123. *Waring v. King*, ib. 571. *Hull v. Vaughan*, 6 Fr. 157.

not liable in respect of such subsequent residence to an action for use and occupation, (l) unless it be shown that he was permitted to remain in possession upon the express or implied understanding that the occupation was to be paid for. But it has been holden, that if the tenant or occupier has entered as a trespasser and wrongdoer, and against the will and consent of the lord, and has remained in possession and used and occupied the land, the latter may, if he pleases, waive the tort, and consent to the occupation, and sue the tenant upon the ordinary implied promise to pay a reasonable remuneration for the occupation and enjoyment of the property. (m)

If the owner accepts rent from a trespasser, this of course is a waiver of the tort, and a creation of a tenancy, with its accompanying rights, duties, and responsibilities.

A lessee is not liable for use and occupation after a fiat in bankruptcy has been issued against him, if the assignees accept his interest in the premises, or if, on their refusal, he delivers or tenders the possession of them to the lessor. (n)

Of the TENANT'S liability to MAINTAIN and REPAIR the demised premises.

Express covenants and agreements to repair.—When the lessee has entered into an express covenant or agreement to repair, uphold, and keep in repair a house, or any other structure or building demised to him, he is bound to rebuild or reconstruct it if it be burned by an accidental fire, or be blown down by tempest, or destroyed by floods, or by any inevitable accident; (o) for “when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore, if the lessee covenant to repair a house, though it be burned down by lightning, or thrown down by enemies, yet he ought to repair it.” (p)

Thus where a lease was made of a meadow, by which the river Exeran, and the lessee covenanted to sustain and repair the banks, to prevent the water from overflowing, upon pain of forfeiture of ten pounds. And afterwards, “by reason of a great, outrageous, and sudden flood,” caused by

(l) *Tew v. Jones*, 13 M. & W. 12.

(m) *Patteson, J., Church v. Imperial Gas Company*, 6 Ad. & E. 854. *Mayor of Newport v. Saunders*, 3 B. & Ad. 412. *Holroyd, J.*, 3 D. & E. 298. *Birch v. Wright*, 1 T. R. 379, 387.

(n) *Slack v. Sharpe*, 8 Ad. E. 366; 3 N. &

P. 390. As to the liability of the assignees in such cases, *Gibson v. Courthope*, 1 D. & E. 206. *Naish v. Tallock*, 2 H. Bl. 320.

(o) 40 Ed. 3, fol. 6, pl. 11.

(p) *Paradine v. Jane*, Aleyn 27; 2 Ssaud. 421, n. (2).

the subversion of the weirs in Devonshire, the banks were overthrown and perished; it was held, that the lessee was excused from the penalty, because the flood was the act of God, which could not be resisted, but that he was still bound to make and repair the banks of the river in convenient time, because of his own covenant. (g)

A builder covenanted to erect and finish, in a substantial and workman-like manner, a bridge across the river Usk, and to uphold and keep the said bridge in complete repair for seven years; and an action having been brought against him for a breach of this covenant, he pleaded that he had built the bridge according to his covenant, and kept it in complete repair, and capable of resisting any usual or ordinary flood, and that the said bridge, by the act of God, by a great, unusual, and extraordinary flood of water, such as such bridge, so well built and in complete repair, could not reasonably be expected to resist, by means of the waters of the said flood rushing and pressing against the same was, without the default of the defendant, broken and washed away, &c.; it was held, that the defendant was nevertheless bound by his covenant to rebuild the bridge; and that if the defendant had wished to protect himself from the consequences of any extraordinary flood, he should have provided therefor by his contract, and should have made a loss of that description an express exception to the general liability. (r)

A tenant for life of a house under a marriage settlement, had covenanted to repair the house during his life, and so leave the same at his death; and an action having been brought against him for a breach of this covenant, he pleaded that three-fourth parts of the house were burnt down, and that he repaired it until it was burnt, and had repaired the residue that was not burnt; and on demurrer to this plea the court held that it constituted no answer at all to the action, for the defendant having covenanted to repair without any exception, it imported that he should at all events repair the house, and in case it were burnt or fall down, should rebuild it. (s) So where a lessee covenanted "to repair, uphold, support, maintain, amend and keep," the demised messuage and premises in needful and necessary repair, and an action having been brought against him for a breach of this covenant, he pleaded that "the house was by accident, and without the default of the defendant or his servants or family, namely, by means of a fire, which accidentally broke out in an adjoining house, and communicated from that to the house in question

(g) Dyer, 33, a. pl. 10.

(r) *The Brecknock Co. v. Pritchard*, 6 T. R.

750.

(s) *Chesterfield v. Bolton*, Com. 627.

burned down and destroyed, and has not since been rebuilt;" it was held that the plea was no answer to the breach of covenant, and that on a general covenant to repair, the lessee was bound to rebuild in case of an accidental fire. (t)

It has been previously stated, that where a tenant has entered into possession under a lease void as to the duration of the term, or holds over and pays rent after a former lease has expired, he is bound by all such of the terms and stipulations of the lease as are applicable to a yearly tenancy. If, therefore, such lease, or the agreement under which he entered and took possession, contains a covenant to repair, he is bound to rebuild in case of accidental fire. (u)

Articles of agreement under seal were entered into between an intended lessor and lessee for the grant of a lease for twenty-one years, as soon as a license from the lord of the manor (the land being copyhold land) could be obtained; and the lessee covenanted to keep the premises in repair during the term so to be granted, and subsequently entered and took possession of the land, and occupied the same under the agreement for the full term of twenty-one years; and it was held that he was responsible upon his covenant to repair, although the intended lease had never been made. (x)

General obligations, duties, and liabilities of the lessee in respect of the maintenance and preservation of the demised premises.—In the absence of an express covenant or agreement to repair, the lessee is not bound to rebuild a house demised to him, which has been burned by an accidental fire, or consumed through the negligence and folly of his own servants. (y) But there results from the demise and acceptance of the lease by the lessee an implied covenant or promise, to use the property demised in a tenant-like and proper manner; to take reasonable care of it, and restore it, at the expiration of the term for which it is hired, in the same state and condition as it was in when demised, subject only to the deterioration produced by ordinary wear and tear, and the reasonable use of it for the purpose for which it was known to be required. (z) In fulfilment of this implied covenant or promise, the lessee is bound to keep the premises wind and water tight, and in a habitable state, if they were in good repair and condition at the time of the demise. He must cleanse

(t) *Bullock v. Dommitt*, 6 T. R. 650.

(u) *Digby v. Atkinson*, 4 Campb. 275.

(x) *Pistor v. Cater*, 9 M. & W. 315. As to the amount of damages recoverable in actions for breaches of covenants to repair, see *Walker v. Hutton*, 10 M. & W. 249. *Clew v. Brogden*,

2 Sc. N. R. 303.

(y) *McKenzie v. McLeod*, 4 M. & Sc. 253; 10 Bing. 385, s. c.

(z) *White v. Nicholson*, *Stanley v. Agnew*, 12 M. & W. 827.

the drains and sewers, (a) and amend all trifling external injuries to the buildings, which, if neglected and left unrepaired, would operate to the serious and lasting injury of the inheritance. He must not suffer the roof to remain uncovered, so as to let the timbers rot. If windows are broken by the wind and hail, or tiles are blown off, or accidentally broken, he is liable for the non-repair of them, if the consequences of his neglect would be damage to the building from rain. (b)

But the lessee is not bound to make substantial and lasting repairs, such as new roofing; nor is he responsible for ordinary wear and tear, deterioration from age, or inevitable accident; and the extent of his liability depends upon the age and general state and condition of the demised premises at the time he took possession of them, and the duration and value of his own term and interest in the property. A tenant from year to year, for example, whose estate may be determined by the lessor by a six months' notice to quit, ending with the current year of hiring, would never be expected to go to the same amount of expense for the repair and preservation of the property, as a tenant for a term of twenty-one years, or a tenant for life. (c) And "if a house be leased to hold at will, the lessor is not bound to sustain or repair the house as tenant, for term of years is tied." (d)

The lessee of house property, moreover, must not remove wainscots or floors, or things fixed to the soil and freehold; he must not pull down and rebuild, open new windows and doors, and change the form and arrangement of the house, without the consent of the owner. He cannot convert one species of edifice into another, such as a cornmill into a fulling-mill, or maltmill, or a watermill into a windmill, though the conversion be to the pecuniary advantage of the landlord, as well as to the benefit of the tenant. (e)

The lessee of farms, orchards, gardens, and lands for tillage and cultivation, likewise impliedly covenants or promises, according as the demise may have been made by deed or by simple contract, to use and cultivate the land, and manure the soil, according to the custom of the country, and the prevalent course of good husbandry in the district where the land

(a) *Russell v. Shenton*, 3 Ad. & E. n.s. 449. *Bell v. Twentymann*, 1 ib. 766.

(b) *Mansfield, C. J., Taylor v. Whitehead*, Doug. 749. *Cheatham v. Hampson*, 4 T. R. 319. *Parteriche v. Powlett*, 2 Atk. 383. *Holford v. Dunnatt*, 7 M. & W. 348. *Stanley v. Agnew*, 12 M. & W. 827.

(c) *Ferguson v. —*, 2 Esp. 590. *An-*

worth v. Johnson, 5 C. & P. 241. *Torriano v. Young*, 6 C. & P. 12. *Leach v. Thomas*, 7 C. & P. 327. The same principle prevails in the French law. See the Cod. civ. liv. 3, tit. 8, art. 1719, 1720, 1754, 5 and 6.

(d) Litt. sec. 71. *Horsfall v. Mather*, Holt, 9.

(e) *Woodfall*, ut sup. 443.

is situate; (f) to take all reasonable care of fruit-trees, vines, strawberry-beds, gardens, and orchards; and generally to exercise such an amount of diligence for the conservation and preservation of the subject matter of the demise, as a prudent and cautious master would exercise for the safety and well being of his own property. (g) He must not impoverish the soil, or seek unjustifiably to enrich himself at the expense of his landlord. He must not fell timber trees, (except for the necessary repairs of a house demised to him with the land); he must not dig for gravel, lime, clay, brick, earth, stone, or the like, except for the necessary repair and improvement of the demised premises. He must not remove virgin soil, (h) nor open quarries or mines of metal or coal, for the purpose of selling the produce thereof; but he may work mines and quarries which were open and in existence at the time of the demise, as they then form part of the annual profits of the land. He must not convert arable land into pasture, or pasture into arable land, or plough up a warren, or divert the courses of streams. (i) He must not take all the fish out of a fish-pond, or the doves from a dovecote, or the deer from a park, or the rabbits and conies from a warren, or the game from preserves. He is entitled to the reasonable use and enjoyment of them, leaving as many in store for the landlord when he goes out, as he found when he was entrusted with the possession and use of the property.

The lessee is moreover bound to keep the fences and ditches, sea walls and boundaries, in good order, and a reasonable state of repair; (k) the extent of his liability in this respect, and for the cleansing of ditches and drains, and the reconstruction of water-courses, will materially depend upon the duration of his lease. A mere tenant at will, whose interest the Roman lawyers called "precarium," is not bound, as we have already seen, to expend money in permanent and lasting repairs and improvements.

But "if tenant at will commit voluntary waste, as in pulling down of

(f) *Ante*, 151, 153; 5 T. R. 373. *Legh v. Hewitt*, 4 East, 154. *Clarke v. Royston*, 13 M. & W. 752. *Hindle v. Pollitt*, 6 M. & W. 529. *Brown v. Crump*, 1 Marsh. 567; Woodfall, 428. So by the French law, "Le fermier d'une vigne doit la bien façonner, la bien fumer, la bien entretenir d'échelles, la provigner, et généralement la cultiver de la même manière qu'un bon et soigneux vigneron cultiverait sa propre vigne. Le fermier d'une métairie doit pareillement bien façonner les terres en saison convenable. Il ne lui est pas permis de les charger, de les dessaisonner; il doit avoir des bestiaux en

quantité suffisantes pour l'exploiter, &c. Pothier. Louage, No. 190.

(g) *Qualem diligentissimus pater-familias suis rebus adhibet*. Instit. Lib. 3, tit. 25, § 5.

(h) *Higgon v. Mortimer*, 6 C. & P. 616, (s). *Ferrand v. Wilson*, 15 Law J., N. S. (Ch.) 41, 53, 54.

(i) *Aldridge v. Howard*, 5 Sc. N. R. 623. As to the construction of a covenant to work mines in a workman-like manner, *Quarrington v. Arthur*, 10 M. & W. 338.

(k) *Chotham v. Hampson*, 4 T. R. 318.

houses, or in felling of trees, the lessor shall have an action of trespass for this against the lessee." (m)

The general duties and obligations of the tenant are the same in the Roman law as in our own law, and are ably and familiarly expounded and set forth by Domat in his treatise on the civil law. (n) "The engagements," says he, "of the person who takes anything to hire, are to put the thing to no other use than that for which it was hired; to use it well; to take care of it; to restore it at the time appointed; to pay the rent or hire, and generally to observe whatever is prescribed by covenant, by law, or by custom. The farmer ought to use the lands he has in farm as any prudent and discreet man would use his own, and to keep them, preserve them, and cultivate them at the proper seasons, in the manner agreed on by the lease, or regulated by custom. He cannot increase his profits out of the lands to the prejudice of the proprietor. He cannot sow arable lands when they ought to lie fallow, nor sow wheat when he ought only to sow barley or oats, if these changes would make the lands to be in a worse condition at the end of the lease than they ought to be.

Short form of lease.—From the preceding observations on the general doctrines and principles of the common law respecting leases and demises of realty, it will be seen that the implied terms of the contract will frequently meet the reasonable requirements of the parties better than the verbose and complicated provisions and stipulations so frequently inserted in leases; and that if parties were to confine themselves to a simple grant of the subject matter of the demise to the lessee, to be holden by him for a certain determinate term, at a certain specified rent, the law would carry out their intentions and provide for their respective interests much better than they are ordinarily provided for by express stipulations. To correct the prolixity, diffuseness, and expense of modern leases, the legislature has provided by stat. 8 & 9 Vict. c. 124, the following short form of demise, which may be used by parties with all the effect of a much more lengthy document:—

"This indenture, made the — day of —, in the year —, in pursuance of an act to facilitate the granting of certain leases, between —, witnesseth that the said — doth demise unto the said — his executors, administrators, and assigns, all — &c., from the — day of —, for the term of —, thence next ensuing, yielding therefor during the said term the rent of £—, to be paid, &c., —. In witness thereof, the said parties have hereunto set their hands and seals." (Ante, 90, 91.)

(m) Litt. sec. 71. *Countess of Shrewsbury's case*, 5 Co. 13 a.; Cro. Eliz. 777.

(n) Les lois civiles dans leur ordre naturelle, L. 1, tit. 4, s. 2.

And if the parties are desirous of annexing other express terms to the contract beyond those which would be added by intendment and implication of law, they may insert one, or more, or all of the following short sentences, which, by the provisions of the act, are to have all the effect of the ordinary lengthy and diffuse covenants—1. That the said — (the lessee) covenants with the said—(the lessor) to pay RENT ;—2. And to pay TAXES ;—3. And to REPAIR ;—4. And to paint outside every—year ;—5. And to paint and paper inside every year ;—6. And to insure from fire in the joint names of the said — (the lessor) and the said — (the lessee) — to show receipts—and to rebuild in case of fire ;—7. And that the said — (the lessor) may enter and view the state of repairs ; and that the said — (the lessee) will repair according to notice ;—8. That the said—(the lessee) will not use premises as a shop ;—9. And will not assign without leave ;—10. And that he will leave premises in good repair ;—11. Proviso for re-entry by the said lessor on nonpayment of rent, or nonperformance of covenants ;—12. The said — (the lessor) covenants with the said — (the lessee) for quiet enjoyment.

The effect of the use of each of these numbered sentences is explained in the schedule of the act, and they will be found to meet the ordinary requirements of leases of house property.

SECTION II.

LETTING AND HIRING OF CHATTELS.

Liability of the lessor or grantor of a chattel to be used for hire.—If a man lets out a chattel upon the express or implied understanding that it is to be put into a serviceable state and made ready for immediate use by the hirer, there is no implied warranty or undertaking on the part of the owner that the chattel is in any particular state or condition, or fit for any particular purpose. But if he expressly or impliedly represents it to be fit for immediate use, or to be applicable to any particular purpose, he impliedly warrants the use for which he receives the hire. If a man, for

example, lets out the naked hull, or the mere fabric of a vessel, upon the terms that the hirer is to man and equip her, and get her ready for sea, there is no implied warranty or undertaking on the part of the shipowner that the vessel is in any particular state and condition at the time of the making of the contract. But if he mans and provisions and equips the vessel himself, and holds her out as fit for immediate use, there is an implied warranty on his part that she is seaworthy and fit for use, and properly found and provided with stores and provisions, seamen and officers, and all things needful to the due prosecution of the voyage.(a)

So if a man lets out the mere fabric of a coach or carriage upon the understanding that the hirer is to provide the horses, harness, servants, and equipments, and prepare the vehicle for use, there is no implied warranty or undertaking on his part that the chattel is in any particular state or condition at the time that he parts with the possession of it; but if he gets it ready for the road, he impliedly warrants the vehicle to be road-worthy and fit for the performance of the journey for which it is known to be required, and this implied warranty extends to the coachman, horses, and harness, and all the other necessary equipments for the journey.

So if a man lets out furniture for immediate use, there is an implied warranty on his part that it is fit for use, and free from all defects inconsistent with the reasonable and beneficial enjoyment of it.(b) "If he lets out vessels for holding oil or wine, and furnishes to the hirer vessels that are not in good condition, he shall be responsible for the damage that may accrue, for he who lets out a thing for use ought to know whether it is fit for use, and to warrant the use for which he takes the hire."(c) If he lets out a horse bridled and saddled, and prepared for immediate use by an equestrian, he impliedly warrants the equipments to be road-worthy and fit for use, and the horse itself to be well shod,(d) and free from such vices and defects as render it dangerous and unfit to ride. The implied warranty does not extend to such defects as merely render the use of a chattel less convenient, and do not deprive the bailee of the substantial enjoyment of it. Thus, if a horse hired for a journey is blind only of *one* eye, or only a little restive, or slightly weak in the legs, the implied warranty does not extend to these defects, because they are not inconsistent with the use of the animal for the purpose required; but if the horse is totally blind, or

(a) *Lyon v. Mells*, 5 East, 437.

(b) *Ld. Abinger, Sutton v. Temple*, 12 M. & W. 60.

(c) *Domat* l. 1, tit. 4, s. 3, 8. Si quis dolia

vitiosa ignarus locaverit : deinde vinum effluxerit, tenebitur in id quod interest. Nec ignorantia ejus erit excusata. Dig. lib. 19, tit. 2, § 1.

(d) *Pothier*, (Louage,) No. 54.

so restive and unsound that he cannot be ridden with safety, then the latter is responsible for a breach of the implied warranty.

When the owner merely grants the use of the chattel, retaining the possession of it through the medium of his own servants and agents, he is bound to keep the chattel in good order and repair; but if the possession of the thing as well as the use of it is transferred to the hirer, this duty falls in the first instance upon the latter. If a coach-proprietor, for example, lets his coach and horses for a journey, and the coach is driven by the coachman, and is under the direction and management of the servants of the owner, the latter is bound to keep the horses properly shod, and the carriage in good travelling order; but if the possession thereof is transferred to the hirer, and the carriage is driven and managed by his servants, this duty then falls upon the latter, although the owner or lessor of the chattel may, under certain circumstances, be obliged, as we shall presently see, to repay to the hirer the money expended by him in repairs.^(c) So if a ship is let for hire to sail on a certain voyage, and the ship remains in charge of the captain and crew and servants of the shipowner, the latter is bound to do all such repairs as may be necessary to keep her in good sailing order, and secure to the hirer that use and enjoyment of the vessel for which the hire was agreed to be paid; but if the mere fabric of the ship is let, and the possession as well as the use of the vessel is transferred to the hirer, so that the latter becomes the bailee of the ship, and puts his own captain and servants on board, and navigates the vessel himself, then he is himself bound to keep her in good sailing condition, and so deliver her up at the expiration of the term of hiring.

The letter of a chattel is by the Roman and Continental law bound to pay to the hirer all extraordinary expenses which have been necessarily incurred by him, without any neglect or default on his part for the sustentation and preservation of the thing let to hire. Thus if a horse hired for a journey, and delivered into the charge and possession of the hirer, was taken sick on the road without any fault or neglect on his part, the expense of the cure, and of the nourishment of the horse during the continuance of the malady, fell upon the owner. So if a loom or a carriage let to hire was injured by some inevitable accident, and required extensive repairs for its preservation, the hirer might repair the chattel and charge the expense thereof on the owner. It is difficult to say, as it has not been made the subject of judicial decision, whether the liability of the owner for repairs

(c) Pothier, (*Louage*), No. 117, 129.

done to a chattel let for hire, would be carried in the common law to the extent that it has been carried in the Roman and Continental law. It may be laid down, however, it is apprehended, as a general rule, that whenever a chattel bailed or delivered to a hirer to be used for hire, has sustained a partial injury through an inherent defect in the article itself, or by reason of some inevitable accident, which threatens its total and immediate destruction, and the effects of such partial injury may be obviated and the chattel preserved for future use by repairs and remedies promptly provided, there is an implied authority from the owner to the hirer to undertake the necessary repairs and apply the remedies, and incur all such expenses as a prudent man would, under the circumstances, incur for the preservation of his own property, and the money so expended would be money paid by the hirer for the use of the owner at his (implied) request, for the recovery of which the hirer might maintain the common form of action for money paid. (Ante, 226—231.)

In order to establish a claim for the payment of expenses of this description in the Scottish law, it is necessary, observes Mr. Bell, to show in the first place that the occasion of the expense was not ascribable to the hirer; secondly, that the expense was indispensably necessary; and, thirdly, that the letter had notice of it as soon as circumstances permitted. (f)

GENERAL DUTIES AND OBLIGATIONS OF THE HIRER.—The general duties and responsibilities of the hirer of a chattel are the same as those of the hirer of realty. Thus the bailee for hire of a ship, a horse, or a carriage, a musical instrument, or a clock, is bound in common with the hirer of a house or a mill, a plantation or an orchard, to use the thing let in a proper and reasonable manner, to take the same care of it that a prudent and cautious man ordinarily takes of his own property, and to return it to the bailor or owner at the time appointed for its return, or within a reasonable period after request, if no such time has been agreed upon, in as good condition as it was in at the time of the bailment, subject only to the deterioration produced by ordinary wear and tear and reasonable use; (g) and injuries caused by accidents which have happened without any fault or neglect on the part of the hirer. (h)

The owner must stand to all the ordinary risks to which the chattel is

(f) 1 Bell's Comm. 453. And see Pothier, (Louage,) No. 129.

(g) *Handford v. Palmer*, 5 Moore, 76; 2 B. & B. 359.

(h) "Le conducteur," observes Pothier "doit jouir et user de la chose qui lui est louée comme

un bon père de famille userait de la sienne propre: il doit avoir le même soin pour la conserver, qu'un bon et soigneux père de famille aurait pour la sienne propre. Louage, No. 190; and see the "OBSERVATION GÉNÉRALE" at the end of the *Traité des Obligations*, 1, 543.

naturally liable, but not to risks occasioned by negligence or want of ordinary caution on the part of the hirer.

If a carriage, for example, let to hire, breaks down on the ordinary public thoroughfare, through the badness of the road, or is injured by a flood or inundation, the owner must bear the loss, although the carriage was driven by the servant and horses of the hirer. But if the hirer had gone out of his way to meet the danger—if he had travelled by unusual and difficult roads, or crossed a plain subject to floods, when he might have kept the high ground and been safe, he must make good the loss that has been occasioned thereby. If the owner sends his own postilion or coachman to drive the carriage, the hirer is discharged from all attention to the horses and the risks of the road, and is bound only to take ordinary care of the glasses and inside of the carriage whilst he sits in it, (i) unless he officiously interferes and gives orders, and takes the management and direction of the vehicle into his own hands.

Of the use of the thing let.—It is also the duty of the hirer not to apply the thing to any other use than that for which it is hired. Thus if a horse is hired as a saddle-horse, the hirer has no right to use it in a cart, or to carry loads, or as a beast of burden. So if it is hired to go to Richmond he has no right to go with it on a journey to York; and if during such misuser a loss occurs, the hirer will be responsible therefor. If a ship hired or chartered for a particular voyage, and placed in the possession and under the control of the charterer, be captured by pirates, or be lost in a storm in the ordinary course of the voyage, the owner must bear the loss; but if the charterer has deviated from the ordinary course, and sailed unnecessarily through dangerous channels, or into seas infested with pirates, and needlessly encountered risks not contemplated by the owner at the time of the making of the charter-party, and which would probably not have been run by him except for a greatly increased rate of remuneration, the charterer is liable for the loss. (k)

If a horse hired for a journey falls on the road, and is lamed, (l) or is injured or destroyed by an accidental fire, or is stolen from a stable in which it has been placed, the owner must bear the loss. But if the hirer by riding immoderately, or at unseasonable hours, and travelling by dangerous and unusual roads, or by leaving the horse by the road side when he might have put it into a stable under lock and key, has imprudently courted danger and invited robbery, he must himself bear the

(i) *Pothier Louage*, No. 106. *Jones*, Bailm. 320.
88, 89.

(k) *Lewin v. East India Company*, Peake,

(l) *Cooper v. Barton*, 3 Campb. 5, n.

loss, and make full compensation to the owner. (*m*) If the horse is taken ill on the journey, and the hirer calls in a farrier, he will not be responsible if the horse dies, although the death may have been occasioned by the injudicious treatment of the latter; but if the hirer neglects to avail himself of proper advice and assistance, or chooses ignorantly to prescribe himself, and from unskilfulness gives the horse improper medicine, and the horse dies, he is liable to the owner for the loss. (*n*)

It is of course the primary duty of the hirer, in the absence of an express stipulation to the contrary, to supply an animal hired by him with suitable food, during the time it is intrusted to him for use; (*o*) and if a hired horse is exhausted, or becomes ill and refuses its feed, and the hirer notwithstanding pursues his journey, and by so doing injures or kills the horse, he will be responsible therefor to the owner. (*p*)

Loans at interest.—Money may be made the subject of a contract of hiring and letting as well as houses and lands, and ordinary chattels. A loan of money to be used for hire, is a loan for use and consumption, the identical thing lent not being intended to be returned, but its equivalent in value and kind. (Post. ch. 25, s. 3.) The absolute property, therefore, in the subject matter of the loan, passes together with the transfer of the possession to the hirer or borrower, and the latter becomes indebted to the lender in an equivalent in value and amount, which must be paid and rendered to the latter at the time agreed upon, or within a reasonable period after demand made, in case no time for its return has been limited. The liability of the hirer or borrower consequently to repay the equivalent amount is not discharged by loss of the money from robbery, fire, or inevitable accident. Thus, if I deliver to a man five hundred sovereigns to be used for hire, and he is robbed on his way home, or the money is destroyed by an accidental fire in the house where he lodged, he must nevertheless pay me the amount at the time appointed. (Post, ch. 25, s. 3.)

(*m*) *Coggs v. Bernard*, 2 Raym. 909, 916.

(*n*) *Dean v. Keate*, 3 Campb. 4.

(*o*) *Handford v. Palmer*, 5 Moore, 74, 79;

2 B. & B. 359, s. c.

(*p*) *Bray v. Mayne*, 1 Gow. N. P. C. 1.

SECTION III.

LETTING AND HIRING OF FURNISHED HOUSES AND LODGINGS, AND ACCOMMODATION IN PUBLIC INNS.

Liabilities of the lessor of ready furnished houses and apartments.—Contracts for the letting and hiring of ready furnished houses and apartments are contracts of a mixed nature, partaking partly of the nature of a demise of realty, and partly of a contract for the letting and hiring of moveable chattels, and the lessor, therefore, in contracts of this description, is clothed with the duties and responsibilities resulting from contracts for the letting and hiring of chattels in addition to those which have been previously described as flowing from demises of realty simply. If a man furnishes a dwelling-house or an apartment in a house, and offers it to be let ready furnished, he impliedly holds it out as fit for immediate habitation and use, and the contract for the letting and hiring of it is analogous to a contract for the letting and hiring of a ship, rigged and manned, and prepared for sea, or of a carriage horsed and equipped, and made ready for a journey on land; (ante, 719;) and there is consequently an implied warranty on the part of the lessor that such ready furnished house or lodging is reasonably fit for habitation and occupation by a tenant; and if the furniture is unfit for use, or is incumbered with a nuisance of so serious a nature as to deprive the tenant of all beneficial enjoyment of it, the latter is entitled to throw up both house and furniture, and bring an action against the landlord for a breach of contract.—Thus, where the beds of a ready furnished house let to a tenant at a rent of eight guineas per week, were so infested and overrun with bugs that they could not be slept in, it was held that the tenant was justified in leaving the house and resisting the landlord's demand for the rent. (a) "In the case of a contract for the hire of a ready furnished house," observes Lord Abinger, "the letting of the goods and chattels as well as the house, implies that the party who lets the house so furnished is under an obligation to supply the other contracting party with whatever goods and chattels may be fit for the use and occupation of such a house, according to its particular description and suitable in every respect for his use." (b)

(a) *Smith v. Marrable*, 11 M. & W. 5; 12 M. & W. 60, 65, 87. M. & W. 60. Parke, B. & Rolfe, B., *ib.* 65, 67. *Hart v. Windsor*, *ib.* 87. Tindal, C. J. *Supplies v. Farnsworth*, 4 M. & Gr. 584.

(b) per *Ld. Abinger*. *Sutton v. Temple*, 12

When a man lets out lodgings or apartments in a house, he impliedly demises them with all their proper accompaniments, and warrants to the hirer the use of all such accessorial things as are necessary to enable him to enjoy the principal subject matter of the demise in the manner intended. He impliedly grants to the tenant the use of the door-bell, the knocker, the skylights or windows of the staircase, and the use of the water-closet, unless it be otherwise stipulated at the time of the taking of the lodgings; and if the landlord deprives him of the use of either, he forthwith subjects himself to an action for a breach of contract. (c) He impliedly covenants or promises, moreover, according as the demise may or may not be under seal, to keep the roof of the house water-tight, and the windows in a reasonable state of repair, so that the lodger and his effects suffer no injury from rain and exposure to the weather.

By the Roman and continental law, moreover, the lodging-house keeper or lessor of apartments who remains in the general possession of the house is bound to exercise all ordinary and reasonable care for the protection of the persons and property of his tenants and lodgers; to see that the outer door is fastened at night, and that strangers or suspected or doubtful characters are not permitted, unknown to the lodger, to congregate in the house at unseasonable hours of the night. He is bound, moreover, to exercise ordinary care and vigilance in the selection and appointment of the servants and domestics within the house, and to take all such precautions as a prudent householder may be expected to take to guard against robbery and fire.

Liabilities of the LESSEE of furnished houses and apartments.—We have already seen that a contract for the letting and hiring of furnished lodgings is a contract for an interest in land within the fourth section of the Statute of Frauds, (ante, 93, 94,) and that a lessee, consequently, who orally agrees to take lodgings at a certain rent, and neglects to enter and take possession, cannot be sued upon the contract for not taking possession, or for the non-payment of the rent reserved or agreed to be paid. (d) Having taken possession, however, he may be sued for use and occupation (ante, 716); and if he brings goods and chattels of his own upon the premises, they may be distrained for the rent of the lodgings as in ordinary cases of demises of pure realty. (e) The liabilities of the lessee in respect of the conservation and preservation of the subject matter of the demise are the same as those of the lessees of realty and the hirers of chattels for use (ante, 718). If the possession as well as the use of the

(c) *Underwood v. Burrows*, 7 C. & P. 28.

(d) *Edge v. Stafford*, 1 Cr. & J. 397, 398.

(e) *Newman v. Anderton*, 5 B. & P. 227.

Mechelen v. Wallace, 7 Ad. & E. 54.

lodgings and furniture is granted to the lessee, the latter is bound to deliver up the furniture at the expiration of the term in good order and condition, deteriorated only by ordinary wear and tear and the reasonable use of it. If he received linen, plate, and household utensils clean and fit for use, he is bound to render them back to the lessor in the same state; (*f*) but if the use only of such linen, plate, and household utensils is granted, as is ordinarily the case in contracts for the letting and hiring of apartments and portions of a house, the possession of them continuing in the landlord who retains the general possession of the house and its contents, the hirer is not bound to clean up the things before he leaves.

Duration of the term of hiring.—Notices to quit.—Lodgings and ready-furnished apartments are rarely the subject of a yearly hiring, and there is no presumption from a general holding thereof in favour of a hiring for a year, and from year to year, as in the case of a demise of land. (*g*) The duration of the term corresponds in general with the time limited for the payment of the rent. If the rent is payable quarterly, the presumption is in favour of a hiring by the quarter; if, on the other hand, it is payable monthly or weekly, there is a hiring by the month or week. The same rule prevails in the French law. (*h*) If the tenancy be from half year to half year, half a year's notice to quit must be given; if from quarter to quarter, a quarter's notice; if from month to month, a month's notice, and if from week to week, a week's notice to quit; and if the lodger quits his apartments without giving such notice, he is liable to the payment of a quarter's, a month's, or a week's rent, according to the term of hiring; (*i*) and the lodging-house keeper may recover such rent, although he has put a bill in the windows advertising the apartments to be let, or has lighted and used fires in the rooms; (*k*) but if he actually re-lets the apartments, the original contract is at an end, and the rent ceases. (*l*)

The length of the notice to be given may be otherwise regulated by the express agreement of the parties, and also by the custom and usage of the district. (*m*) It must, however, in all cases expire at the end of the current term of hiring. (*n*)

If apartments are hired in a dwelling-house at a fixed rent, payable

(*f*) *Stanley v. Agnew*, 12 M. & W. 827.
 (*g*) *Abbott, C. J., Willson v. Abbott*, 4 D. & R. 694. *Right v. Darby*, 1 T. & R. 162.
 (*h*) *Pothier, Louage*, No. 30.
 (*i*) *Doe v. Hazell*, 1 Esp. 94. *Doe v. Raffan*, 6 Esp. 4. *Doe v. Scott*, 4 M. & P. 20; 6 Bing. 362, s. c. *Doe v. Bayley*, 5 C. & P. 67; 6

East, 121, n.
 (*k*) *Redpath v. Roberts*, 3 Esp. 225. *Griffith v. Hodges*, 1 C. & P. 419.
 (*l*) *Walls v. Atcheson*, 11 Moore, 379; 3 Bing. 462; 2 C. & P. 268, s. c.
 (*m*) *Huffell v. Armistead*, 7 C. & P. 57.
 (*n*) *Ante*, s. 1. *Doe v. Scott*, 4 M. & P. 20.

half yearly, the hiring is for a year certain, and the tenant may leave at the end of the first year without giving any notice to quit. If, however, the tenant continues in possession after the first year under such a hiring, a taking from year to year may be inferred. (o) The same rule prevails in the case of a hiring for a week. (p) A tenant agreed to pay for the occupation of furnished apartments, "from March the 4th to September the 4th, the sum of 52*l.* 10*s.*;" also "to occupy the rooms from the 4th of September to the 4th of December on the same terms, viz., 26*l.* 5*s.* for the three months, or to take them unfurnished at the rate of 84*l.* per annum;" and it was held that this was a lease for six months and for a further period of six months, and not a lease from year to year. (q)

If a tenant remains in possession of lodgings after the termination of his term of hiring, or after the expiration of a notice to quit, the landlord has no right to expel him by force, and turn out his boxes and trunks and goods and chattels into the street; but must assert his rights by peaceable means through the medium of the legal tribunals, and with the aid of the accredited officers of the law. (r) But if the lodger has removed his baggage, goods, and chattels, and has left the house, the landlord may lock the door upon him, and resist his re-entry by force.

Letting and hiring of stowage and places of deposit.—A contract for the letting and hiring of a vault, or store, or place of deposit in a warehouse, is a contract analogous to the letting and hiring of an apartment in a house for the occupation of a tenant or lodger. In the civil law, a man who let out a store or place of deposit for corn, wine, oil, or merchandize of a perishable character, impliedly warranted his store-house to be fit for the purpose for which it was known to be required. If the hirer had inspected it, and approved it prior to the contract, the store-keeper was not responsible for patent defects which the hirer might by the exercise of ordinary vigilance have made himself acquainted with, but for all latent defects causing injury to the property deposited he was responsible. If the store-room was in a roofed building, he was bound to keep the roof water-tight. If the places of deposit were upon or below the surface of the ground, he was bound to keep them properly drained and free from water. If he remained in the general possession of the premises, it was his duty to see that the outer gates were fastened at a proper hour of the night, that suspicious characters were not permitted to lurk about the spot, and that the rooms and stores were watched with proper

(o) *Willson v. Abbott*, 4 D. & R. 693.

(p) *Huffell v. Armistead*, 7 C. & P. 56.

(q) *Atherstone v. Bostock*, 2 Sc. N. R. 643;

2 M. & Gr. 511.

(r) *Hillary v. Gay*, 6 C. & P. 284. *Newton*

v. Harland, 1 M. & Gr. 644; 1 Sc. N. R. 474.

and reasonable care. (s) He was bound, in short, to take all ordinary precautions to secure his storehouse from attacks without, and from dangers within, from damage by fire and damp, and all things hurtful to the property deposited beneath his roof.

LIABILITIES OF COMMON INNKEEPERS.

Of the distinction between a LODGING-HOUSE KEEPER and a COMMON INNKEEPER.—"Every person who makes it his business to entertain travellers and passengers, and provide lodging and necessaries for them and their horses, and attendants, is a common innkeeper; and it is in no way material whether he have any sign before his door or not." (t) "A sign," observes Holt, C. J., "is not essential to an inn, but is evidence of it." (u) A London "coffee-house," where beds and provisions are furnished by the day or for the night, or for a longer period, to persons in certain stations of life, who may think fit to apply for them, is a common inn. (x) But if a man merely opens a house for the sale of provisions and refreshments, and does not profess to furnish beds and lodging for the night, he is not a common innkeeper. (y) And if he professes to let only private lodgings, and does not offer his house to the public as a place of reception and entertainment and lodging for all comers who are able and willing to pay for the accommodation offered, he cannot be said to keep a common inn.

Of the duty of a common innkeeper to furnish lodging and food to all travellers.—Every man who opens an inn by the way-side, and professes to exercise the business and employment of a common innkeeper, is, by the common law or custom of the realm, bound to afford such shelter and accommodation as he possesses to all travellers who apply and tender, or are able and ready to pay the customary hire, (z) and are not drunk or disorderly, or labouring under contagious or infectious diseases. (a) And if he neglects or refuses so to do, he is liable to an action on the case for the recovery of any damages that may have been sustained by reason of

(s) *Horrearii qui horrea sua locant ad depouendas merces, etiam exactæ custodiæ operas locasse intelliguntur. Igitur si merces perierunt aut susceptæ sunt, tenentur eo nomine quod hanc custodiam non præstiterint: de vi majore autem non tenentur.* Pandect. Just. ed. Poth., lib. 19, tit. 2, s. 3, art. 3. 71.

(t) Bac. Abr. Inns. (B.)

(u) *Parker v. Flint*, 12 Mod. 255.

(x) *Thompson v. Lacy*, 3 B. & Ald. 283.

(y) *Doe v. Laming*, 4 Campb. 77.

(z) Godb. 346, pl. 440; 1 Salk. 388; 12 Mod. 484. *Rex v. Frens*, 7 C. & P. 219; 6 T. R. 17, 18. *Hawthorn v. Hammond*, 1 C. & K. 404.

(a) *Howell v. Jackson*, 6 C. & P. 725. *Fell v. Knight*, 3 M. & W. 269; ib. 220, 221.

such refusal ; (b) and also to an indictment at common law. (c) The innkeeper is bound moreover to receive and provide for the horses of all travellers who alight at his inn, if he has room in his stables, even, it is said, of those who choose only to put up their horses, resorting elsewhere for lodging and entertainment. But he is not bound to receive the goods of a person who professes merely to make use of the inn as a place of deposit, and not to lodge there as a guest. (d) Neither is he bound to provide for his guest the precise room that the latter may choose to select, nor to provide him with a bedroom, if he declares it to be his intention to sit up all night. All that he is required to do is to find reasonable and proper accommodation for his guests ; and if he tenders such accommodation, and the guest refuses it, he may compel the latter to quit the inn, and seek for accommodation and lodging elsewhere. (e)

To the duties and obligations which attach to the innkeeper in common with all lodging-house-keepers, and lessors of furnished rooms and apartments for immediate occupation, the law has superadded the duty of protecting the goods of their guests from robbery. It has been justly observed by the civilians, that the common wants and necessities of mankind compel men to trust valuable property to the keepers of public inns, who are often needy persons, and men of suspicious character, and have frequent opportunities of combining and colluding with thieves, to the prejudice of those who trust them ; and it was thought right in the Roman law to deprive such persons of the temptation to do wrong, and to compel them to be honest and faithful to their employers, by making them responsible for the safety of goods entrusted to their keeping. By a public edict of the Roman prætor, it was ordained, that if shipmasters and carriers, innkeepers and stablekeepers, did not restore what they had received to keep, *SAFE*, he would give judgment against them. (f) The construction put upon this edict was, not that the shipmaster, carrier, or innkeeper, was bound to deliver the goods safe at all events ; but that he was bound to deliver them, unless prevented by a *fatale damnum*, or a loss by what was termed the decree of fate, or order of destiny, such as a loss by lightning, or an earthquake, or a sudden inundation that could not have

(b) Bro. Abr. *Act. sur. ca.*, 76. *Collin's ca.* Godbolt, 246. *Newton v. Trigg*, 1 Shew. 246 270.

(c) *Rex v. Levellin*, 12 Mod. 445. *Rex v. Ivens*, 7 C. & P. 219.

(d) *Wainbrooke v. Griffith*, Mo. 876, 877. *Sanders v. Plummer*, Orl. Bridg. 227. *Bennett v. Mellor*, 5 T. R. 273. *Binns v. Pigot*, 9 C. & P. 208.

(e) *Fell v. Knight*, 8 M. & W. 276.

(f) Ait Prætor NAUTÆ, CAUPONES, STABULARII, QUOD CUIUSQUE SALVUM FORM RECIPERINT NISI RESTITUUNT IN EOS JUDICIUM DABO. Dig. Lib. 4, tit. 9. Maxima est utilitas hujus edicti ; quia necesse est plurimque eorum fidem sequi, et res custodiam eorum committere . . . et nisi hoc esset statutum materia daretur cum furibus adversus eos quos recipiunt, cocundi. Dig., lib. 4, tit. 9, s. 1.

been foreseen, and that no human care or skill could have provided against or avoided; or an irresistible attack by pirates and hostile forces, the enemies of the state.

The spirit of the edict of the Roman prætor has been universally adopted by the jurisprudence of continental Europe, and was introduced at an early period into our common law. Thus we learn from the writ in the register, that "according to the law and custom of the realm of England, innkeepers who keep common inns for the accommodation of persons travelling through the parts where such inns are situate, and sojourning within the same, are bound to guard, both by day and by night, the goods and chattels of such travellers placed within their inns, without subtraction or loss, so that no damage shall come to them from the neglect of the innkeeper or his servants." And the reason given for this strict and extended liability, is "the opportunities that innkeepers would otherwise lie under to embezzle goods entrusted them, without possibility of proving a particular neglect." (g)

As soon, therefore, as a traveller has entered an inn, and deposited his baggage and effects in the hands of the master of the inn or his servants, or in a room or other place in the inn assigned to such traveller as a lodging, the innkeeper impliedly undertakes to be answerable (h) for their safety and security from robbery. (i) "The innkeeper is bound in law to keep them safe, without any stealing or purloining; and it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber in which he lodged, and that he left the chamber door open; but he ought to keep the goods and chattels of his guest there in safety. And although the guest doth not deliver his goods to the innholder to keep, nor acquaint him with them, yet if they be carried away, or stolen by persons unknown, the innkeeper shall be charged." (k) It has accordingly been holden, where a guest laid a reticule containing money on her bed, and afterwards went into her sitting-room, the door of which was opposite the bedroom, and remained there about five minutes, and then sent her companion for the reticule, which was missing, and could not afterwards be found, that the innkeeper was bound to make good the loss. (l)

(g) Per Holt, C. J., 12 Mod. 492.

(h) So by the French law, Des l'instant qu'un voyageur entre dans un hotelierie, il se form entre lui et l'hotelier une convention tacite par laquelle ce dernier s'engage envers le voyageur a le loger et nourrir et a garder ses voitures harnais et autres effets. Encyclopedie du droit, (AUBERGE,) 16.

(i) *Drosse v. Theyar*, Poph. 178; 2 Fitz. Abr. fol. 28. (*Hostler*.) *Beed's v. Morris*, Cro. Jac.

224. *Richmond v. Smith*, 8 B. & C. 11.

(k) *Calve's case*, 8 Co. 32. Ainsi sauf le cas de vol a main armée, ou de toute autre force majeure, tels que la foudre, un inondation &c. les aubergistes répondent de la perte ou de l'avarie des effets du voyageur, sans que ce dernier ait rien autre chose a prouver que l'apport qu'il en a fait dans l'auberge. Ency. du Dr. (AUBERGE,) Art. 2, § 2, 16.

(l) *Kent v. Stuckard*, 2 B. & Ad. 803.

A traveller went to an inn, taking with him divers packages of silks of various kinds, some of which were taken up stairs to his bedroom, and others were by his directions carried into the commercial room into which he was shown. After remaining for some days therein, and after having been several times taken out and brought back again by the traveller, the goods were stolen, and an action having been brought against the innkeeper to recover the value of the property, it was shown to be the practice of the inn to take all the luggage of the guests into their bedrooms, unless orders to the contrary were given; and it was contended that the traveller, by ordering the goods to be taken into the commercial room, which was a place of common resort for all the guests indiscriminately, had taken the goods under his own protection, and could not therefore make the innkeeper responsible for the loss; but the court held, that if the innkeeper had intended not to be responsible for goods deposited by the guests in the commercial room, he should have declared his intention to them at the time the goods were placed there, and not having done so, that he was responsible for the loss. (m)

A servant having been sent by his master with goods to market, and being unable to sell them, went with them to an inn, and asked if he could leave the goods there until next market-day. The innkeeper's wife said they were very full of parcels, and declined to take charge of them. The servant then sat down in the inn, ordered something to drink, and put the goods on the floor immediately behind him. When he got up again, the goods were gone, and were never afterwards seen or heard of. An action was then brought against the innkeeper to recover the value of the goods, and it was held that he was responsible for the loss. "If, indeed, the innkeeper," it was observed, "had refused to take in the plaintiff's servant as a guest, and he had notwithstanding gone into the inn, the plaintiff could not have charged the defendants with the loss of his goods; in such a case the innkeeper refuses at his peril, and if it be without reason, an action lies for the refusal; but in this case there was no refusal of the person; the defendants merely refused to take care of the goods until the next week. And when the plaintiff's servant was sitting in the inn with the consent of the innkeeper, (for the latter did not object to receive him,) he was in the same situation as any other guest, and entitled to the same protection for his goods." (n)

But "if a guest come to a common innkeeper to harbour there, and he

(m) *Richmond v. Smith*, 8 B. & C. 9.

(n) *Bennett v. Mellor*, 5 T. R. 273. Ib. 276, per Grose, J.

responsibilities of a bailee, (c) for a man does not become a guest at an inn by the mere delivery of goods to the landlord to keep. It has been said, however, that a man may become "a guest by leaving his horse as much as if he had staid himself, because the horse must be fed, by which the innkeeper has gain, otherwise if he had left a trunk or a dead thing." (d) "If an host invite one to supper, and, the night being far spent, invites him to stay all night, if he is afterwards robbed, yet shall not the host be charged, (as an innkeeper,) for this guest was no traveller." (e) But the length of time that a man may remain at an inn does not affect or alter his character as a traveller, or in any way qualify or vary the common law liability of the innkeeper. Thus "if A. comes with goods to an inn in London, and stays there for a week, month, or longer, and is there robbed of them, he shall have an action against his host; though, perhaps, being at the end of his journey, he cannot then be said to be *transeuns* according to the writ in the register." (f) But if a man takes apartments in an inn for a term, by the week, month, or year, for example, or if he resides in the inn under a special contract for his bed and board, he is not in contemplation of law sojourning at the inn as a traveller, but rather in the character of a lodger at a private boarding-house. If, therefore, he is robbed in the house, he cannot charge the landlord as an innkeeper, but only as an ordinary lodging-house keeper.

Liability of the GUEST.—Innkeeper's LIEN on the goods and chattels of the guest.—As the law imposes upon the common innkeeper the burthen of receiving and taking care of the goods and chattels of all travellers and guests who alight at, and take up their abode within, the inn, it gives him a right to retain such goods and chattels as a pledge for the payment of the reckoning of the guest. (g)

If a horse is put up in the stables of the inn by a guest, the innkeeper has a lien on the animal for its keep, whether the horse be the property of the guest or of some third party, from whom it has been fraudulently taken, or stolen, unless the innkeeper knew at the time he received the guest that he was not the true owner of the horse. (h) But the innkeeper has no right to detain the property of the guest if he has previously agreed to give the latter credit for his entertainment; (i) nor can the innkeeper detain goods as

(c) *Gelley v. Clerk*, Cro. Jac. 188; 5 T. R. 274, per Buller J.

(d) *York v. Grindstone*, 1 Salk. 388; 2 Raym. 866. *Lane v. Cotton*, Com. 104.

(e) Bac. Abr. (INNS,) C. 5.

(f) *Ib.*

(g) *York v. Grindstone*, 1 Salk. 388. Ency. du Dr. (Anberge) 25. *Jones v. Thurloe*, 8 Mod.

172. *Rosse v. Bramsted*, 2 Rolle, 438. *Thompson v. Lacy*, 3 B. & Ald. 285. But he has no right to detain the person of the guest, *Sundolf v. Atford*, 3 M. & W. 248.

(h) *Yorke v. Grenough*, 2 Raym. 866. *Shipwith v. —*, 1 Bulst. 170. *Johnson v. Hill*, 3 Stark. 172.

(i) *Jones v. Thurloe*, 8 Mod. 172, 173.

a security for the payment of the reckoning for beer and ale drunk by a guest, unless the requirements of the stat. 11 & 12 Wm. 3, c. 15, as to selling beer in stamped vessels, and rendering an account of the number of quarts and pints drunk, have been complied with.

The innkeeper holds the chattels detained by him in the nature of a pledge, so that if he once permits his guest to take them away, and so relinquishes the pledge, he cannot afterwards retake them. Therefore, if the innkeeper allows the guest to remove his horses after a debt has been incurred for keeping them, and they are afterwards brought to the inn and a new debt contracted, the innkeeper can detain them for the latter portoin of the debt, but not for the former.^(l) And it is said that if several horses are brought to an inn by the guest, each is a pledge for its own keep, but not for the keep of the others, so that if the hosteller permit him to take away all but one, he cannot retain that one until the expense of keeping the whole is paid.^(m)

If the guest takes the chattel away without the hosteller's consent, the latter may take it on a fresh pursuit as a distress rescued if he follow promptly, but not otherwise.⁽ⁿ⁾

^(l) *Jones v. Thurlow*, 8 Mod. 172, 173. *Jones v. Pearle*, Str. 556, 557.

^(m) *Moss v. Townsend*, 1 Bulstr. 207.
⁽ⁿ⁾ *Rouse v. Bramsted*, 2 Ro. 438.

CHAPTER XXIII.

CONTRACTS FOR THE LETTING AND HIRING OF WORK AND LABOUR.

SECTION I.—*Master and servant.*—Of the nature and authentication of a contract of hiring and service—Implied contracts of hiring and service—Service with relations—Of the duration of the term of hiring and service—Yearly hirings of domestic servants defeasible by custom—Indefeasible yearly hirings—Hiring and service by the month or week—General duties, obligations, and liabilities of the master and servant—Payment of wages—Dissolution of the contract—Dismissal of the servant for misconduct—Warning and notice to leave.

SECTION II.—*Contracts of apprenticeship.*—Nature and requisites of the contract—Liabilities of the parties thereto—Liability of the master to support his apprentice in sickness—Dissolution of the contract—Cancellation of the indentures—Discharge of the apprentice by award of justices—Parish apprentices.

SECTION III.—*Letting and hiring of work by the great, or task-work.*—Work and service giving a right to remuneration—Honorary offices and employments—Services by arbitrators, barristers, and physicians—Liabilities of the employer or letter out of task-work—Indivisible work—Divisible and apportionable services—Destruction of the work before payment—Non-performance of work by a time specified—Approval of work before payment—Useless and defective work—Duties and liabilities of task workmen—Of the preservation and redelivery of chattels bailed to workmen to be manufactured or repaired—Liabilities of warehousemen and wharfingers, agisters of cattle, factors, and bailiffs.

SECTION I.

MASTER AND SERVANT AND APPRENTICE.

Contracts for the letting and hiring of work and labour, services and skill.—The contract of letting and hiring relates as frequently to human labour and skill, care, and attention, as to moveable and immoveable property, realty, and personalty; the services of workmen, artificers, and labourers being daily hired to be employed in domestic affairs, in the cultivation of land, in the building of houses, in the manufacture of materials furnished to be worked up, and upon chattels which have been bailed to

the workman to be mended or repaired. (a) In order to constitute a contract of hiring and service, there must be a mutual engagement binding on both the employer and the employed, for the one to employ and remunerate, and the other to serve. (b) A covenant on the part of a workman to work, and on the part of the employer to pay him a sum of money weekly during the two years following the date of the contract, and an additional sum weekly during the year next following, and to receive him into partnership at the expiration of three years, does not amount to a contract of hiring and service for the term of three years, or for any fixed period of time, and the employer, consequently, is not responsible upon the contract for discharging the workman from his service, although he would be bound to make good the weekly sums so long as the latter was ready and willing, and offered to perform the work agreed to be done, and was prevented by the employer from doing it. (c)

If a servant covenants or agrees with an intended employer to serve him for a term of years, and the latter covenants or promises to pay so much a week for such service, the law does not imply from the covenant or agreement to serve a corresponding covenant to employ, and the master or employer may, consequently, in the absence of an express covenant or agreement on his part to retain and keep the servant in his employ, dismiss him at any time without warning or notice, and refuse to provide him with further employment. (d) When, however, mutual covenants or promises have been exchanged between the parties, the contract is complete, so that the right to the labour and service at once passes to the employer, and the right to the benefit of the retainer, and employment to the servant or undertaker of the work, so that the former is entitled to an action against the latter if he neglects to enter upon and complete his task, and the latter to an action against the former if he neglects to provide the work, and furnish the workman with the means of earning the hire. (e)

Authentication of the contract.—A contract of hiring and service need not be authenticated by writing, unless the hiring exceeds a year in duration, (ante, 97,) and if reduced into writing it need not be stamped, if it be a contract for the hire of "labourers, artificers, manufacturers, or menial servants," (ante, 126,) and not a contract of apprenticeship. (f)

(a) Ostendit definitio, duo esse genera locationis, rerum unam, alteram *operarum seu factorum*. Vin. Com¹ lib. 3, tit. 25, 757; Pandect. Pothier, lib. 19, tit. 2, Art. 1.

(b) *Less v. Whitcomb*, *Sykes v. Dixon*, ante, 25, 26.

(c) *Aspdin v. Austin*, 5 Ad. & E., n. s., 671.

Ante, 205.

(d) *Dunn v. Salys*, 5 Ad. & E., n. s., 685. *Williamson v. Taylor*, ib. 175.

(e) Dalt. Just. 93, c. 31; ante, 205.

(f) *Rex v. St. Paul's, Bedford*, 6 T. R. 454, post. 748.

Implied contracts of hiring and service.—In the absence of an express contract between the parties, a hiring may be presumed from the mere fact of the service, (ante, 215,) unless the service has been with near relations as presently mentioned. If a man, for example, serves a stranger in the capacity of a clerk, or of a menial servant, or servant in husbandry, for a continued period, the law presumes that the service has been rendered in fulfilment of a contract of hiring and service, and if the party has served without anything being said as to wages, the law presumes that the parties contracted for customary and reasonable wages. (g)

Service with RELATIONS.—But if the service has been with the parent or uncle, or other near relation of the party serving, a hiring cannot be implied or presumed from it, but an express hiring must be proved in order to support a claim for wages, for the law regards services rendered by near relations to one another as gratuitous acts of kindness and charity, and does not presume that they are to be paid for unless there is an express contract to that effect. (h) And if a poor person is taken in out of charity and provided with food, lodging, clothes, and necessaries, and set to work, no contract of hiring and service is implied therefrom, however long the party may continue to serve. (i)

Of the DURATION of the TERM of HIRING and SERVICE.

Yearly hirings DEFEASIBLE by CUSTOM.—*Hiring of domestic servants.*—A general hiring of menial or household servants, such as cooks, scullions, house-maids, footmen, butlers, coachmen, grooms, where no time is mentioned for the duration of the service, is a hiring for a year, and so on from year to year, defeasible by custom and usage, at the option of either of the parties, on giving a month's warning, or paying or tendering a month's wages. (k) If the contract is put into writing, the customary power of defeasance is impliedly annexed to the express terms of the written agreement, unless the custom is excluded by express words. (l)

A servant may be a menial servant, and as such clothed, with this im-

(g) Lord Ellenborough, C. J., 15 East, 454. *Phillips v. Jones*, 1 Ad. & E. 333.

(h) *Davies v. Davies*, 9 C. & P. 87. *Gregory Stoke v. Pitminster*, Botta. P. L. C. 206, case 269. *Rex v. Sow*, 1 P. & Ald. 181. *Rex v. St. Mary, Guildford*, 2 Bott. 209, c. 273. Cald. 521. *Rex v. Stokesley*, 6 T. R. 757.

(i) *Rex v. Weyhill*, Burr. 491; 1 W. Bl. 206, s. c.; 2 Bott. 207, case 271. As to charitable and gratuitous employments, see 7 East, 373.

Rex v. Sow, 1 B. & Ald. 178. *Sands v. Leak*, 2 Roll. rep. 268. *Alfred v. Margus Fitzgans*, 3 Esp. 3.

(k) *Littledale & Patteson Ja.*, 5 B. & Ad. 908, 909; 3 N. & M. 180, 181; 2 N. & P. 142, 143; *Ld. Denman*, 5 Jur. 870. *Robinson v. Hindman*, 3 Esp. 235. *Archard v. Horner*, 3 C. & P. 351.

(l) *Johnson v. Blenkinsop*, 5 Jur. 870.

plied power of defeasance, although he does not reside within the walls of the master's house. Thus where a head gardener was hired for a year at £100 wages, to superintend hothouses, pineries, &c., and a house was assigned him within his master's grounds, and he had the privilege of taking in apprentices for a year at £15 premium, and had five under-gardeners to assist him, and after serving for several years he received a month's warning, which expired in the middle of the current year, whereupon the gardener claimed an entire year's wages, it was held that he was a menial servant, and, as such, only entitled by custom to "a month's warning, or a month's wages." (m)

When a power of defeasance is vested in the parties either by custom or special agreement, or the contract is made defeasible upon the happening of a given event, the hiring is nevertheless a yearly hiring, (n) so that if the power of defeasance is not exercised, and the contract is permitted to run on, and the service to continue for a year, there is a year's hiring and service, which will gain a settlement under the poor laws. (o) "It is a yearly hiring notwithstanding the power of determining it, if that power is not exercised before the expiration of the year. The contingency not having happened and the contract not having been defeated during the year it enures after the year's service as a yearly hiring." (p)

Indefeasible yearly hirings.—When the employment of a servant is of a permanent nature, and annual wages are reserved, the hiring is in all cases a yearly hiring; (q) and when the servant is not a household or domestic servant, the hiring cannot be put an end to by either party without the consent of the other, before the termination of the current year. A hiring of a servant in husbandry, for example, is an indefeasible yearly hiring, (r) analogous to a yearly tenancy. At the end of each year a new contract arises to serve for the year commencing, which will continue as long as the parties may please, and can only be terminated at the end of the current year, (s) unless the servant is guilty of misconduct. A general hiring of a clerk, foreman, journeyman, or traveller, at annual wages, "with board in the house,"

(m) *Nowlan v. Ablett*, 2 C. M. & R. 57.

(n) *Rex v. Atherton*, Burr. 203, No. 71. *Rex v. Birdbrooke*, 4 T. R. 246. *Bayley, J.*, 1 B & Ad. 341. *Rex v. Farleigh Wallop*, 1 B. & Ad. 340, 342. *Rex v. New Windsor*, Burr. 22, No. 7.

(o) *Ld. Kenyon*, 4 T. R. 246. 5 ib. 207, 208. *Rex v. Gt. Yarmouth*, 5 M. & S. 114. *Rex v. Northwold*, 2 D. & R. 792. Ante, 659.

(p) *Rex v. Sandhurst*, 7 B. & C. 562; 1 M. & R. 101, s. c. *Rex v. Byker*, 3 D. & R. 336; 2 B. & C. 119, s. c. per *Bayley, J.* *Rex v. Lid-*

ney, Burr. s. c. 1.

(q) 3 T. R. 76; 5 T. R. 506. As to exceptive hirings, see *Reg. v. Holbeck*, 4 Ad. & E. n. s. 590. 1b. 597.

(r) *Rex v. Lyth*, 5 T. & R. 327. *Abbott, C. J.*, 6 D. & R. 101; 4 B. & C. 86. *Rex v. Elslack*, 2 B. Mott, 231, pl. 298.

(s) *Bell v. Chaytor*, 1 C. & K. 162. *Beeston v. Collyer*, 12 Moore, 552; 2 C. & P. 208, s. c. *Williams v. Byrne*, 2 N. & P. 139. *Dunn v. Murray*, 9 B. & C. 780.

is also a yearly hiring, which can only be put an end to by consent, or at the expiration of the current year; (*t*) and so also is a general hiring of postilions and ostlers, upon the terms that they are to receive board and lodging in the house, and the vails or perquisites of the stables in lieu of wages; (*u*) also a general hiring of a warehouseman, "the employer engaging to pay 12*l.* 10*s.* per month for the first year, and advance 10*l.* per annum until the salary should be 180*l.*;" (*x*) also a general hiring of editors, sub-editors, reporters, and other persons regularly employed upon old standing and permanently established newspapers and periodicals. (*y*)

A RESERVATION of *quarterly, monthly, or weekly* WAGES is not inconsistent with a yearly hiring. "Whether the wages be to be paid by the week or the year cannot make any alteration in the duration of the service if the contract were for a year;" (*z*) but if there has been no continued service for a lengthened period, and there is nothing in the nature of the employment, and no particular custom or usage leading necessarily to the conclusion that the hiring was for a year, the payment of weekly or monthly wages raises a presumption in favour of a weekly or monthly hiring. (*a*)

HIRING *by the MONTH*.—A journeyman miller was hired "at 8*s.* a month wages, with liberty to depart at a month's wages or a month's warning," and the hiring was held to be a hiring by the month. (*b*) But when the wages are reserved weekly with a proviso for a month's warning, the presumption is in favour of a conditional and defeasible yearly hiring.

HIRING *by the WEEK*.—If there be any thing in the contract to show that the hiring was intended to be for a year, then a reservation of weekly wages will not control that hiring. But if the payment of weekly wages be the only circumstance from which the duration of the contract is to be collected, it must be taken to be only a weekly hiring." (*c*) The following hirings have been held to be hirings for a week, and so on from week to week. A hiring of a maid servant at 1*s.* 4*d.* a week, and board and lodg-

(*d*) 3 Burr. 823; 12 Moore, 552. *Turner v. Robinson*, 5 B. & Ad. 789; 2 N. & M. 829, s. c.; 6 C. & P. 15, s. c. *Aikin v. Adon*, 4 C. & P. 208.

(*u*) 3 Burr. 759, C. 236; 2 Bott. 294; Burr. 823, No. 257; 2 Bott. 299, c. 296; Cald. 443; 2 Bott. 230, pl. 297. *Rex v. St. Martin's, Leicester*, 8 B. & C. 674.

(*x*) *Fawcett v. Cash*, 5 B. & Ad. 908; 3 N. & M. 180, s. c.

(*y*) *Holcroft v. Barber*, 1 Car. & Kirw. 4. *Baxter v. Nurse*, ib. 10.

(*z*) *Kenyon, C. J.*, 4 T. R. 246. *Beeton v.*

Collyer, 12 Moore, 552. *Rex v. Hales*, 5 T. R. 668. *Callo v. Brouncker*, 4 C. & P. 518. *Rex v. Seaton*, Cald. 440.

(*a*) *Rex v. Puckelchurch*, 5 East, 384. *Bayley v. Rimmell*, 1 M. & W. 507. *Baxter v. Nurse*, 7 Sc. N. R. 801, 6 M. & Gr. 935, s. c.

(*b*) *Rex v. Clare*, Burr. 819, No. 255; 2 Bott. 229, pl. 295.

(*c*) *Ellenborough, C. J.* 3 M. S. 245; Burr. 280, No. 98; 5 East, 384; 2 East, 425; 12 East, 352. *Ashurst, J.*, 2 T. R. 455, 622. *Buller, J.*, 5 ib. 208. *Baxter v. Nurse*, 7 Sc. N. R. 801; 6 M. & Gr. 935, s. c.

ing for as long time as they wanted a servant." (d) A hiring of an assistant plumber and glazier at 6s. a week wages, board, lodging, and washing, summer and winter." (e) A hiring of a gardener at 6s. a week for the winter and 9s. a week for the summer ; " (f) and a hiring of a hostler at 2s. a week in the summer, and 1s. 6d. a week in the winter. "The mere arrangement," observes Bayley, J., "that the wages shall be at one rate in the summer and at another in the winter does not show that the parties contemplated a service to endure through the summer and winter, and therefore that they intended a hiring for a year; but shows only that they intended that if the servant, being hired at weekly wages, should remain till the summer, he should then have so much per week. The true meaning of such an arrangement is merely this: that the servant's wages as a weekly servant are to be regulated by the seasons." (g)

A hiring of a servant in husbandry "at 4s. weekly wages, board, washing, and lodging, except in the harvest month, when the wages are to be increased to 10s. 6d. a week, and then again reduced to 4s.," and a hiring of a servant at "8s. per week, and two guineas for the harvest, to do anything the gardener should set him about," were also respectively held to be weekly hirings, although, as it was contended in the last case, the agreement for a gross sum to be paid for the harvest, imported an agreement for service for a consolidated period inconsistent with a mere weekly hiring. (h) But if terms are introduced inconsistent with the notion of a weekly hiring, the reservation of weekly wages will be regarded merely as a mode of payment and not as an indication of the duration of the contract. Thus the presumption of a weekly hiring resulting from a reservation of weekly wages is rebutted by a stipulation for a fortnight or a month's notice to quit. (i)

Service at will.—A boy was employed to work "for meat, drink, and clothes, as long as he had a mind to stop," and served for two years upon these terms, and the service was held to be a mere service at will. (k) So where an assistant workman was "to come and go as he liked," and an ostler and his master were "to be at liberty to separate when they pleased," the service was held to be a service at will. (l) In these cases

(d) *Rez v. Elstack*, 2 Bott. 231, pl. 298.

(e) *Rez v. Dedham*, Burr. 653, 2 Bott. 227, pl. 298.

(f) *Rez v. Warminster*, 9 D. & R. 70.

(g) *Rez v. Rolvenden*, 1 M. & R. 691.

(h) *R. v. Dodderhill*, 3 M. & S. 243. *R. v. Lambeth*, 4 ib. 315.

(i) *R. v. Hampreston*, 5. T. R. 208. *R. v.*

St. Andrew, Pershore, 8 B. & C. 679. *R. v. Birdbrooke*, 4 T. R. 246. *R. v. Gt. Yarmouth*, 5 M. & S. 117.

(k) *R. v. Christ's Parish, York*, 3 B. & C. 459; 5 D. & R. 314.

(l) *R. v. Gt. Bowden*, 7 B. & C. 249; 1 M. & R. 13, Mag. Cas. 42. *It. v. Elstack*, 2 Bott. 231, c. 298.

there is in truth no contract of hiring at all.(m) The transaction amounts merely to an authority to serve upon certain terms. If the work is actually performed and accepted, the law raises an implied promise of remuneration from the employer to the workman, but the former is not bound to provide the work, nor is the latter bound to execute it.

GENERAL DUTIES, OBLIGATIONS, and LIABILITIES of the MASTER and SERVANT.

Liabilities of the MASTER.—It is the first duty of the master after the contract of hiring and service has been entered into, to take the servant into his employ and enable him to earn the hire or reward agreed to be paid, and if he neglects so to do he renders himself liable forthwith to an action for a breach of contract.

Payment of wages.—If the contract of hiring and service leaves the amount of salary to be fixed by a third party, an application by the clerk or servant to such third party to fix the salary, is a condition precedent to the liability of the employer.(n) If a household servant, hired for a year or any aliquot portion of a year, is hurt or disabled, or falls sick whilst doing his master's business, the master is not entitled to make any deduction from the agreed wages for the time that the servant was incapacitated for the performance of his ordinary work.(o) And if after having taken the servant into his service, he improperly dismisses him, or prevents him by a continued system of persecution from continuing in the service, he is liable for a year's, a month's, or a week's wages, according as the hiring may have been by the year, month, or week.(p) The servant has his choice of divers remedies: first he may bring an action for the wrongful dismissal, declaring specially upon the contract, and so recover the damages he has sustained. This remedy he may pursue immediately.(q) Secondly, if he waits until the expiration of the term for which he was hired, he may then sue for a year's, a month's, or a week's wages, according as the hiring may have been by the year, month, or week. In declaring, in the last case, upon the contract, he may aver that he has performed his own part of it, his readiness to serve being considered

(m) *R. v. St. Matthew's, Ipswich*, 3 T. R. 449.

(n) *Owen v. Bowen*, 4 C. & P. 93.

(o) *Rex v. Winterset*, Cald. 300. *Rex v. Sudbrooke*, 1 Smith, 59. *Chandler v. Grieves*, 2 H. Bl. 606, n.

(p) So, by the French law, Si c'est par le fait du maître qui est le conducteur de ces services,

qu'il ne les lui rend pas, le maître doit payer au serviteur l'année entière de ces services; et il peut même être condamné aux dommages et intérêts du domestique. Pothier, Louage, N^o. 173, 174.

(q) *Pagani v. Gandolfi*, 2 C. & P. 370; *Dunn v. Murray*, 9 B. & C. 780.

equivalent to actual service. (r) And, lastly, he may, after the term of service has expired, sue for his wages in *indebitatus assumpsit*, relying on the doctrine of constructive service. (s)

When the contract is for a year's service at wages, payable yearly, the contract is entire and indivisible, and the servant or workman cannot recover from the employer wages *pro ratâ*, (t) unless the contract has been rescinded or abandoned, or has been put an end to by the exercise of a power of defeasance vested in the parties; (u) so that if the servant dies in the middle of the year, his personal representatives will not be entitled to recover a proportionate part of the salary in respect of the time he actually served; (x) and if he is himself guilty of such misconduct as entitles the master to dissolve the contract and dismiss him from his service, (post, 746, 747,) he will lose all right to wages in respect of the portion of the year he has actually served. (y) But if the contract is put an end to by virtue of a power of defeasance vested in either of the parties by custom or by agreement, or if the contract has been abandoned by mutual consent, the wages are apportionable, and the servant must be paid *pro ratâ* up to the time of his departure. (z)

The bankruptcy of the master does not operate *ipso facto* as a dissolution of a contract of hiring and service, and a certificate under a commission of bankruptcy discharges the master only from such wages as were provable under the commission. (a)

If the amount of wages to be paid has not been settled and agreed upon by the contract, there is an implied promise on the part of the employer to pay wages according to the customary and reasonable rate of remuneration. Against the claim for wages, the master cannot set off the value of goods lost or broken by the gross negligence of the servant, unless there is an express agreement to that effect. But the master must bring

(r) *Gandell v. Pontigny*, 4 Campb. 375. *Collins v. Price*, 1 M. & P. 239; 8 Bing. 14, s. c. And see ante, 205.

(s) See the notes to *Cutter v. Powell*, 2 Smith's leadg. cas. 20, 21. *Smith v. Kingsford*, 3 Sc. 279. *Smith v. Hayward*, 7 Ad. & E. 544; 2 N. & P. 432, s. c. *Robinson v. Hindman*, 3 Rep. 234.

(t) Car riens est due tanque le fin de l'an, quod nota, et le contract est entier, et ne poet ester sever. Bro. Abr. fol. 57, (LABORER,) pl. 48; ib. fol. 170, pl. 31; Vin. Abr. (APPORTIONMENT) 8 & 9.

(u) *Ellenborough, C. J., Spain v. Arnott*, 2 Stark. N. P. C. 256. *Huttman v. Boulnois*, 2 C. & P. 512. *Atkin v. Adon*, 4 C. & P. 208. *Giraud v. Richmond*, 15 Law J., n. s.,

(C. P.) 180; Bro. Abr. (APPORTIONMENT) 26, pl. 13.

(x) *Countess of Plymouth v. Throgmorton*, Salk. 65; 3 Mod. 153, s. c.; 6 T. R. 326.

(y) *Turner v. Robinson*, 5 B. & Ad. 789; 2 N. & M. 829, s. c. *Ridgway v. Hungerford Market Company*, 3 Ad. & E. 171; 4 N. & M. 797, s. c.; Pothier, Louage, No. 174.

(z) *Lamburn v. Cruden*, 2 Sc. N. E. 584; 2 M. & Gr. 252. *Bayley v. Rimmell*, 1 M. & W. 506. *Phillips v. Jones*, 1 Ad. & E. 338; ante, 213—216.

(a) *Thomas v. Williams*, 1 Ad. & E. 685; and see 5 & 6 Vict., c. 122, ss. 28, 29, as to the payment of clerks' and servants' wages in cases of bankruptcy.

his cross action against the servant for compensation for the damage he has sustained. (b) Neither can the master deduct from wages money paid by him to effect the servant's cure from a dangerous illness. (c)

Presumption of payment.—"If a servant has left a considerable time without claiming wages, the presumption is that all the wages have been paid." (d) And if it is usual, in the case of particular classes of servants and workmen, to pay the wages weekly or monthly, and many weeks or months have elapsed without any claim or demand on the part of the servant, there may be a *prima facie* presumption of payment. (e) But the master cannot be perfectly secure from liability, and may in many cases be made to pay twice over if he neglects to take a written receipt or to secure some evidence of the payment.

Jurisdiction of justices.—By 20 Geo. 2, c. 19, 31 Geo. 2, c. 11, and 4 Geo. 4, c. 34, disputes between servants in husbandry, artificers, handicraftsmen, miners, colliers, pitmen, glassmen, potters, and workmen in divers branches of manufactures, (f) and their masters, respecting the non-payment of wages, are to be heard and determined by one or more justice or justices of the peace, who may examine the complainant upon oath, and make an order for the payment of such wages as shall appear to be due, provided the sum do not exceed 10*l.* in the case of a servant, nor 5*l.* in the case of any artificer, handicraftsmen, miner, &c., as therein mentioned, and on non-payment by the master of any sum so ordered to be paid for twenty-one days, the amount may be levied by distress on his goods and chattels. (g) These acts extend only to masters and servants, and not to contracts for the doing of taskwork. (h)

The master is not responsible for personal injuries sustained by the servant in the execution of the master's commands, if the master has done no act calculated to conceal the danger of injury, and lull to sleep the vigilance and prudence of the servant. "The master is, no doubt, bound to provide for the safety of his servant in the course of his employment to the best of his judgment, information, and belief; but the law does not imply from the mere relation of master and servant an obligation on the part of the master to take more care of the servant than he may reasonably be expected to take of himself." (i) Neither is the master liable

(b) *Le Loir v. Bristow*, 4 Campb. 184.

(c) *Sellen v. Norman*, 4 C. & P. 80.

(d) Gazelee, J., *Sellen v. Norman*, 4 C. & P. 81.

(e) *Evans v. Birch*, 3 Campb. 10.

(f) Abbott, C. J., 4 C. & P. 81, n.

(g) 8 East, 118; 7 B. & C. 539. Domestic servants are not within these statutes, *Kitchen*

v. Shaw, 6 Ad. & E. 729; 1 N. & P. 791, s. c.

(g) *Burn's Justice, (SERVANTS)* s. 2.

(h) *Lancaster v. Greaves*, 9 B. & C. 628; 7 Dowl. 702; 1 M. & S. 624.

(i) *Priestly v. Fowler*, 3 M. & W. 5. *Quarman v. Burnett*, 6 ib. 499.

for surgical attendance and medicine rendered to a servant who has been injured in the execution of the master's service, (*k*) unless the surgeon has been called in by the master's orders. (*l*)

DUTIES and OBLIGATIONS of the SERVANT.

Every servant impliedly undertakes to obey the just and reasonable commands of the master, (*m*) and to be careful, diligent, and industrious in the performance of the work intrusted to him to execute. He is not bound to fulfil the unjust and unreasonable commands of a hard task-master, nor to perform work and services not fairly coming within the scope of his employment. "He is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself." (*n*) A servant who undertakes an office of skill impliedly represents himself to be possessed of the skill requisite for the due discharge of the functions of the office, and if he does not possess that skill, or if possessing it he fails to exercise it, he is responsible for a breach of contract and of the implied duties of his situation. Thus, if a gardener prunes and trains his master's fig-trees and vines so unskilfully as to injure or destroy the trees, he is liable to an action for the damage or loss he has occasioned. So if a coachman injures or destroys his master's carriage or horses by gross ignorance and want of skill in driving, he is liable for such injuries. A servant, whilst engaged in the service of a tradesman, impliedly promises to serve faithfully and do no act knowingly and wilfully which may injure his trade or undermine his business. He must not attempt to draw away his master's customers; but there is no law which prevents him from soliciting prospective custom from them at some future period when he hopes to be able to set up in business for himself. (*o*)

Servants in husbandry, labourers, miners, artificers, handicraftsmen, and workmen in various branches of trade and manufactures are liable to be summoned by their masters before justices for absenting themselves and refusing to work and fulfil their contracts, and may, on conviction, be committed to jail. (*p*)

(*k*) *Newby v. Wiltshire*, 2 Esp. 739. *Wen-
nall v. Adney*, 3 B. & P. 247, overruling
Scarman v. Castell, 1 Esp. 270.

(*l*) *Cooper v. Phillips*, 4 C. & P. 581. *Lamb
v. Bunce*, 4 M. & S. 275; ante, 100.

(*m*) *Rex v. St John Devises*, 9 B. & C. 900,
901; 4 M. & B. 680.

(*n*) Per Cur., *Priestly v. Fowler*, 3 M. &
W. 6.

(*o*) *Nichol v. Martin*, 2 Esp. 734.

(*p*) 13 Geo. 2, c. 8, s. 8; 20 Geo. 2, c. 19,
s. 1; 6 Geo. 3, c. 25, s. 4; 4 Geo. 4, c. 34;
Burn's Justice, (SERVANTS,) 880, 881.

DISSOLUTION *of the* CONTRACT.

Dismissal for misconduct.—If a servant wilfully disobeys or habitually neglects the just and reasonable orders of the master; if he absents himself repeatedly from the service, or refuses to perform his work, or to submit to the domestic regulations of the house, or is guilty of gross moral misconduct, the contract may be dissolved by the master, and the servant dismissed.

The following INSTANCES *of MISCONDUCT and DISOBEDIENCE* have been held to warrant a dismissal of the servant and a dissolution of the contract by the master:—Being frequently absent and sleeping out without leave; (g) pregnancy; (r) assaulting a fellow maid-servant with intent to ravish her; (s) refusing to conform to the hour of dinner; (t) trespassing unlawfully in game preserves; (u) enticing away of the master's servants; (x) becoming the father of a bastard; (y) seducing the master's maid-servant; repeatedly coming home intoxicated; (z) making fraudulent entries in account-books; (a) absence from the master's dwelling-house for a night to visit a sick mother against the will of the master, and after leave of absence had been asked for and refused; (b) the setting up of a claim, inconsistent with the relation of master and servant, such as a claim to be a partner, (c) or the assertion of rights and privileges not warranted by the contract or the nature of the service, and injurious to the interests of the master. (d) And it is apprehended that the entertaining of guests at the master's expense, without his knowledge and without any express or implied permission so to do, would be a good ground of dismissal. (e)

The following instances of misconduct and disobedience of orders, on the other hand, have been held *not* to constitute a sufficient ground of dismissal and dissolution of the contract of hiring and service without notice. Temporary absence without leave, producing no serious inconvenience to the employer; (f) occasional insolence of manners and sulki-

(g) *Robinson v. Hindman*, 3 Esp. 235. As to customs to take holidays, see ante, 165.

(r) *Rex v. Brampton*, Cald. 14, 16, 17.

(s) *Atkin v. Aden*, 4 C. & P. 208.

(t) *Spain v. Arnott*, 2 Stark. 256.

(u) *Read v. Dunsmore*, 9 C. & P. 588.

(x) *Turner v. Robinson*, 6 C. & P. 15; 5 B. & Ad. 789; 2 N. & M. 829, s. c.

(y) *Rex v. Welford*, Cald. 57.

(z) *Wise v. Wilson*, 1 C. & K. 662.

(a) *Baillie v. Kell*, 6 Sc. 379, 4 Bing. N. C. 638, s. c.

(b) *Turner v. Mason*, 14 M. & W. 112; 14 Law J., N. S., (Exch.) 311.

(c) *Amor v. Fearon*, 1 P. & D. 398.

(d) *Lacy v. Osbaldiston*, 8 C. & P. 80.

(e) But see *Smith v. Kingsford*, 3 Sc. 279.

(f) *Fillicul v. Armstrong*, 7 Ad. & E. 557; 2 N. & P. 406, s. c.

ness ; and occasional disobedience in matters of trifling moment, such as neglecting to come on one or two occasions when the bell rang ; stopping at one hotel when ordered to stop at another ; (*g*) temporary absence on customary holidays, (*h*) or for the purpose of having a severe hurt attended to, (*i*) or for the purpose of procuring another situation, such absence being warranted by custom. (*k*)

WARNING *and* NOTICE TO LEAVE.—In the case of a yearly hiring, not made defeasible by custom or by the agreement of the parties, reasonable notice must be given on either side of the intention of determining the contract, which notice must expire with the current year of hiring, as in the case of a tenancy from year to year (ante, 667—673); but the same length of notice is not required in the case of a yearly hiring of a servant as is required in the case of a yearly hiring of land. A quarter's notice, given a quarter of a year before the expiration of the current year of hiring, would in all cases be amply sufficient, and a month's notice is often all that is required by custom and usage to determine the contract and entitle the servant to leave.

SECTION II.

CONTRACTS OF APPRENTICESHIP.

When the employer exercises some trade, craft, or mystery, and it is made a term of the contract that he shall teach as well as employ and remunerate the servant for some specific period in return for the service rendered, the contract amounts to an apprenticeship, a term derived from the French word *apprendre*, to learn. A service as an apprentice for a certain number of years is generally a necessary preliminary to the exer-

(*g*) *Callo v. Brouncker*, 4 C. & P. 518.

Cussons v. Skinner, 11 M. & W. 161.

(*A*) *Reg. v. Stoks*, 5 Ad. & E., n. s., 303.

(*i*) *Rex v. Sharrington*, 2 Bolt. P. L. 525.

Chandler v. Grieves, 2 H. Bl. 606, n.

(*k*) *Rex v. Islip*, 1 Str. 423. *Rex v. Polesworth*, 2 B. & Ald. 483.

cise of particular trades and professions, and as the contract is always made to last for more than one year, it must be authenticated by writing, signed by the party to be charged therewith (*ante*, 96—98). At common law, no particular description of written instrument is requisite to create a contract of apprenticeship. By the stat. 5 Eliz., c. 4, s. 25, the binding of an apprentice for the purpose of exercising trades was required to be made by *INDENTURE*; but now, by 54 Geo. 3, c. 96, s. 2, it is enacted, that it shall be lawful for any person to take or retain or become an apprentice, though not according to the 25th, 30th, and 41st sections of the statute of Elizabeth, and that indentures, deeds, and *agreements in writing*, entered into for that purpose, which would be otherwise invalid and ineffectual, shall be valid and effectual; but it is provided, that the enactment shall not affect the immemorial customs of towns or bye-laws of corporations.

It is essential to the validity of every contract of apprenticeship that it be stamped with the *ad valorem* stamp imposed by 55 Geo. 3, c. 184, and that the consideration or premium paid or given with the apprentice be *truly* stated and set forth upon the face of the instrument. The stat. 8 Anne, c. 9, s. 35, requires "the full sum or sums of money received, or in anywise directly or indirectly given, paid, agreed, or contracted for, with, or in relation to every clerk, apprentice, or servant placed with any master or mistress to learn any profession, trade, or employment, to be "truly inserted and written in words at length in some indenture or other writing which shall contain the covenants, articles, contracts, or agreements relating to the service of such clerk, apprentice, or servant," and every indenture or writing wherein such sum of money is not truly inserted is made absolutely void (s. 39) and unavailable in any court or place, or to any purpose whatsoever. And no such indenture or writing is to be admitted in evidence in any suit brought by any of the parties thereto, unless the party on whose behalf it is tendered in evidence makes oath that to the best of his or her knowledge the sum mentioned therein was really and truly all that was directly or indirectly paid to or for the benefit of such master or mistress. (*a*)

An agreement by a married woman to pay a sum of money, in addition to the premium inserted in the indenture, does not avoid the contract, inasmuch as the agreement is invalid by reason of the coverture. (*b*) And if the master reserves to himself a certain proportion of the apprentice's earnings, this is not a benefit to him within the meaning of the statute,

(*a*) *Rex v. Keynsham*, 5 East, 311.

(*b*) *Rex v. Bourton*, 9 B. & C. 872; 4 M. & R. 681, s. c.

for which an additional duty is to be paid, the master being by law entitled to the whole of the apprentice's earnings. (c) If the contract is not stamped within the time prescribed by the statute of Anne, it is absolutely void, (d) unless the apprentice is a poor person apprenticed at the expense of the parish or some public charity (post, 752.)

To make a valid apprenticeship conferring a settlement under the poor laws, the binding must be by a deed executed by the apprentice himself. A covenant on the part of his parents and guardians, that he shall serve for the term specified, and an actual service under the indenture, will not suffice to gain him a settlement as an *apprentice* unless the contract is executed by him. (e)

An indenture of apprenticeship is sufficiently executed by the apprentice desiring a bystander to write his name opposite the seal, and by his then taking the deed and delivering it to his master. (f)

LIABILITIES of the PARTIES to the CONTRACT of APPRENTICESHIP.

Liabilities of the APPRENTICE and other PARTIES to the INDENTURES.—As the contract of apprenticeship is invariably created by deed the liabilities resulting therefrom will depend upon the terms and covenants of the particular contract. The apprentice, and some one or more of his relations or friends, usually covenant that he shall faithfully serve the master during the term of the apprenticeship, keep his secrets, obey his lawful commands, and preserve and protect his property; that he shall neither contract matrimony nor commit fornication, nor play at cards, dice, or any other unlawful games; nor buy or sell for his own gain and profit; nor frequent taverns or play houses; nor absent himself from his master's service; and generally that he shall behave himself in all things as a faithful apprentice. Provision is also usually made for the assignment of the apprentice, and a return of a portion of the premium in case of the death of the master.

An infant above the age of fourteen, and unmarried, is by the custom of London responsible upon covenants contained in indentures of apprenticeship executed by him just the same as if he were of full age. (g) But he is by the common law, where the apprenticeship is not within the city of London, exempt from liability thereon, *ex contractu*, by reason of

(c) *Rex v. Wantage*, 1 East, 602.

(d) *Rex v. Church Hulme*, 5 B. & Ad. 1029.

(e) 8 W. & M. c. 11, s. 8; 31 Geo. 2. c. 11, s. 1. *Rex v. Ditchingham*, 4 T. R. 770. *Rex v. Arnesby*, 3 B. & Ald. 584.

(f) *Rex v. Longnor*, 4 B. & Ad. 649; 1 N. & M. 576, s. c.

(g) 2 Ro. 305; Palm. 361; Moore, 134; 2 Bulstr. 192; 2 Keb. 687.

his minority, (post ch. 26). Therefore it is that his friends ordinarily become bound for his faithful service and good conduct during the period of the apprenticeship.(h) The parties who covenant for the continued service and good conduct of an infant apprentice, are not responsible upon their covenants for trifling and pardonable instances of misconduct, such as staying out on Sunday evenings half an hour beyond the time allowed,(i) or for temporary absence and disobedience of orders unattended by substantial injury to the master. But for all gross misconduct and repeated or lengthened absence, producing substantial injury to the master, they will be held responsible, and if an infant apprentice who has executed indentures of apprenticeship, avoids the contract on his coming of age, and refuses to continue in the service of the master, they are bound to make good whatever damage is sustained by the latter by reason of such repudiation of the contract.(k)

Liability of the MASTER.—The master usually covenants in the indentures of apprenticeship to take the apprentice into his service and *teach* him the art or trade he himself exercises or carries on; to find him in meat, drink, and lodging, and sometimes with wearing apparel, washing, and all other necessities during the term. The sickness of the apprentice, or his incapacity to serve and to learn by reason of ill health, or an accident, does not discharge the master from his covenant to provide for him and to maintain him, inasmuch as the latter takes him for better or for worse, and must minister to his necessities in sickness as well as in health.(l) The same amount of misconduct which in the case of a contract of hiring and service would authorize the master to dissolve the contract, and discharge the servant, will not release him from liability upon his covenant in an indenture of apprenticeship.(m) But if the apprentice is guilty of such an amount of misconduct as renders it impracticable for the master to maintain, employ, and teach him according to the terms of the indentures, the master cannot be sued for neglecting to perform his covenants in that behalf, inasmuch as the capability of the apprentice to be instructed, maintained, and provided for, by the master is naturally a condition precedent (ante, ch. VI.) to the liability of the latter upon such covenants.(n) If the apprentice deserts the master's service and enlists in the army, or contracts another relation which disables him from lawfully returning to his master, the latter is not bound to receive him

(h) Cro. Car. 179; Cro. Jac. 194. *Cuming v. Hill*, 3 B. & Ald. 59.

(i) *Wright v. Gihon*, 3 C. & P. 588.

(k) *Cuming v. Hill*, 3 B. & Ald. 59.

(l) *Rex v. Hales Owen*, 1 Str. 99. *Reg. v.*

Smith, 8 C. & P. 153.

(m) *Winston v. Linn*, 2 D. & R. 475; 1 B. & C. 460. *Wise v. Wilson*, 1 C. & K. 669.

(n) *Mercer v. Whall*, 5 Ad. & E. n. s. 447—466. 14 Law, J., n. s. (Q. B.) 267.

back and instruct him if he returns. ;(o) and "by the custom of London it is a sufficient cause for a master to turn away his apprentice if he frequents gaming houses," although gaming may not be expressly prohibited by the indentures.(p)

If the fulfilment of the contract has not been prevented by the wrongful act of the master, the latter is not bound to refund any portion of the premium he has received.(q)

Payment of wages.—By 4 Geo. 4, c. 34, s. 2, a summary method of recovering wages due to apprentices is provided through the medium of an order of justices, provided the wages sought to be recovered do not exceed £10 in amount.

Dissolution of the contract.—The indentures of apprenticeship of an infant apprentice may be avoided by the infant on his coming of age, and the master must trust for the continuance of the service thereunder to the covenants of those who engage for the infant.(r) The contract may also be dissolved by cancelling the indentures, or by giving them up with the consent of all parties *animo cancellandi*; (s)—likewise by the death of the master or of the apprentice(t)—by the bankruptcy or insolvency of the master(u); by an award of justices, or by the decree of the court of Queen's Bench.

Discharge by award of justices.—The apprentice may be discharged from his apprenticeship, and the contract determined, in case of misconduct, either on the part of the master or the apprentice, by an award of justices at quarter sessions for the counties, if the master resides in a county, or of a mayor or other head officer of a borough, with the assent of three other of his brethren, or men of best reputation therein, if the master resides within a borough.(x) The award must be founded on evidence given on oath; must be under the hands and seals of four justices; or of a mayor, and "three of his brethren, or men of best reputation;" must set forth the cause of the discharge, and be enrolled by the clerk of the peace, or town clerk, amongst the records of his office.(y)

The statutes 20 Geo. 2, c. 19, 4 Geo. 4, c. 29, 5 Vict. c. 7, further enact, that where no premium, or not more than £25 premium, has been paid with the

(o) *Hughes v. Humphreys*, 9 D. & R. 721, 6 B. & C. 680, s. c.

(p) Per Cur. *Woodroffe v. Farnham*, 2 Vern. 290.

(q) *Cyff v. Brown*, 5 Pr. 297.

(r) *Ex parte Davis*, 5 T. R. 715. *Ex parte Gill*, 7 East, 376.

(s) *Cald.* 126; 3 T. R. 605; 6 East, 89; 3 M. & S. 460; 3 B. & C. 484; 5 D. & R. 339, s. c.

(t) 1 Salk. 68; 2 Str. 1266; Sid. 216; 1 Lev.

177; 32 Geo. 3, c. 57; 5 Vict. c. 7.

(u) 6 Geo. 4, c. 16, s. 49.

(x) 5 Eliz. c. 4, s. 35, *Hawthornth and Hilary's case*, 1 Wms. Saund. 313—316; 4 M. & W. 664; Skin. 108. As to the mode of proceeding, see Burn's Justice, APPRENTICES, s. 9.

(y) Carth. 198; 6 Mod. 182; 2 Raym. 1117, 1410; 1 Str. 663, 143; 1 Salk. 68; Skin. 98; 2 Str. 704, 1113.

apprentice, it shall be lawful for two justices, upon any complaint by an apprentice of misusage, refusal of necessary provision, cruelty or ill treatment by the master or mistress, to summon the latter before them, examine into the complaint, and upon proof thereof made upon oath, (z) to discharge such apprentice, by warrant or certificate under their hands and seals, and order all, or any portion of the premium paid with such apprentice, to be refunded. They may also discharge the apprentice, on like complaint by the master or mistress of the misbehaviour of the apprentice, and proof of such misbehaviour on oath. (a)

Of the binding of apprentices by parish officers, or by the trustees of public charities.—By stat. 43 Eliz. c. 2, the churchwardens and overseers of parishes are empowered, with the assent of two justices of the peace, to bind pauper children (who have attained the age of nine years, (56 Geo. 3, c. 139, s. 7) to be apprentices, until such children, if males, shall come to the age of 21 years, (18 Geo. 3, c. 47,) or if females, shall come to the same age, or be married. (b) And by 56 Geo. 3, c. 139, s. 11, reciting that the premium given on the apprenticeship of poor children, or a part thereof, is oftentimes clandestinely provided by parish officers, who are thus enabled to bind out such poor children without the sanction of justices of the peace, it is enacted, “that no indenture of apprenticeship, by reason of which any expense whatever shall be incurred by the public parochial funds, (c) shall be valid and effectual, unless approved of by two justices of the peace under their hands and seals.” (d)

The providing a poor person with a suit of clothes out of the parochial funds, in order to fit him for his situation, is not an expense incurred by such funds within the meaning of 55 Geo. 3, c. 139, s. 11, so as to require the indenture and binding to be approved of by two justices in the mode thereby provided. (e) But if the master, before the execution of the indenture, requires clothes for the intended apprentice, and the parish officers give money out of the parochial funds to the latter, or to his parents and relations, to buy clothes, this is an expense incurred by the public parochial fund, within the statute 56 Geo. 3, c. 139, and the indenture is consequently void, if unapproved of by two justices. (f) But the statute applies only to poor children, and therefore where an adult of the

(z) *In re Gray*, 2 D. & L. 539.

(a) 1 Burn's Justice, 207. *Finley v. Jovle*, 12 East, 248.

(b) *Rex v. St. George Exeter*, 3 Ad. & E. 370; 4 and 5 Wm. 4, c. 56. 1 Burn's Justice, 224—262. Ed. 1845.

(c) 1 B. & Ad. 916; 8 B. & C. 70 3 M. &

R. 386; 7 B. & C. 563; 1 M. & R. 458.

(d) 5 B. & Ad. 169; 2 N. & M. 86; 10 B. & C. 12; 1 M. & R. 458; 7 B. & C. 563.

(e) *Rex v. Quainton*, 1 Ad. & E. 133; 3 N. & M. 289, s. c.

(f) *Rex v. Mattishall*, 8 B. & C. 735; 3 M. & R. 386, s. c.

age of 24 was bound apprentice, part of the premium being paid out of the parochial funds, it was held that the indenture did not require the assent of two justices. (g)

All indentures and instruments for placing out poor children apprentices at the sole charge of any parish or township, or of any public charity, are exempt from all stamp duties, and so are indentures of apprenticeship in the sea-service. (h) The premium therefore given by parish officers or trustees of public charities, upon the binding of a pauper apprentice, need not be set out in the indenture in words at length, the insertion of the premium being required only to ascertain the amount of the duty. (i) But if anything is given or agreed to be done by the relations or friends of the poor apprentice, in addition to the sums paid by the parish or the trustees of the charity, as an inducement to the master to take the apprentice, it must be set out on the face of the contract, and the proper stamp affixed, or the contract will be void. (k) Money given by the relations and friends for the purpose of procuring clothing for the boy, in order to fit him for his situation, is not such a consideration as the statute requires to be set out in the contract. (l)

SECTION III.

LETTING AND HIRING OF WORK BY THE GREAT OR TASKWORK.

A contract for the letting out and hiring of work by the great, or as it is more commonly called job or taskwork, is a contract for the doing of work in the lump or the job, for a stipulated or implied remuneration, such as a contract to build a house, or dig a well, or make a canal, or to construct a ship, or a carriage, out of materials furnished by the employer; (a) or to sell goods for a commission on the sale.

(g) *Rex v. St. John Bedwardine*, 5 B. & Ad. 169; 2 N. & M. 86, s. c. *Rex v. Arundel*, 5 M. & S. 257.

(h) 55 Geo. 3, c. 184; 5 & 6 Wm. 4, c. 19, s. 35; Burr. 574, 697; 3 B. & Ald. 382.

(i) *Rex v. Oadby*, 1 B. & Ald. 477.

(k) *Rex v. Baildon*, 3 B. & Ad. 427. *Rex v. Aylesbury*, 3 B. & Ad. 569.

(l) *Rex v. North Oram*, 2 Str. 1132; Burr. 642. *Rex v. Leighton*, 4 T. R. 732. *Rex v.*

Walton, 3 T. R. 515. *Rex v. Portsea*, Burr. 884.

(a) Le contrat de louage d'ouvrage est un contrat par lequel l'une des parties contractantes donne un certain ouvrage à faire à l'autre, qui s'oblige envers elle de le faire pour le prix convenu entre elles. La partie, qui donne à l'autre l'ouvrage à faire, s'appelle le locateur : celle qui se charge de le faire s'appelle le conducteur. Poth. Louage, No. 392.

A contract of this description was styled by the civilians *LOCATIO OPERIS FACIENDI*, or the letting out of work to be done. The employer was called *LOCATOR OPERIS*, or the letter out of the work; and the workman who undertook the task, and bestowed his labour and skill in its completion, for a reward to be paid to him, was called *CONDUCTOR OPERARUM*, or the hirer of the work. The terms letter and hirer, however, are applicable, in different senses to each of the contracting parties. Thus the locator operis, or letter out of the work, is also conductor operarum, or hirer of the labour and services; and the conductor operis, or hirer of the work, is also locator operarum, or the letter out of the labour and services. (b) When chattels were delivered to a warehouseman or storekeeper to be taken care of or kept for hire, the contract was a contract for the letting and hiring of care and custody, termed *LOCATIO OPERIS ET CUSTODIÆ*.

There is a great analogy, it is observed, by the civilians, between this contract and the contract of sale; and we are told in the Digest and in the Institutes, how to discriminate between the one and the other. If, it is said, the materials for the work, as well as the work itself, have been furnished by the workman, then the contract is a contract of sale. If, on the other hand, the employer has furnished the materials, and the undertaker of the work contributes his labour merely, the contract is a contract of letting and hiring of labour. Thus, to quote an example from the Roman law, "If Titius should agree with a goldsmith for the making of a certain number of golden rings, of a specified size and weight, for ten aurei, the goldsmith to furnish both the gold and the workmanship, the contract would be a contract of buying and selling. But if Titius should give his own gold, and agree to pay only for the workmanship, then the contract would be a contract of letting and hiring simply." (c) So, if I employ a portrait-painter to paint my portrait, and the painter provides the materials for the work, as well as the labour and skill requisite for its execution, the contract is a contract of purchase and sale, rather than a contract for the letting and hiring of work.

If the groundwork of the labour or the principal material entering into its composition has been provided by the employer, the contract is a contract for the letting and hiring of work, although the undertaker of the work may have furnished the accessorial materials necessary for its

(b) Sed dicendum est in hac specie locationis diverso respectu eundem et locatorem et conductorem videri. Nam qui operam locare dicitur, ille idem dicitur conducere opus faciendum: et ex contrario qui operam dicitur conducere, idem dicitur locare aliquid faciendum; ut conductor operis idem sit operæ locator, et locator operis

idem operæ conductor. Vin. Com., lib. 3, tit. 25, p. 758.

(c) Dig., lib. 19, tit. 2, lex 2; Instit. lib. 3, tit. 25, § 4, § 1; Cod., lib. 4, tit. 65. *Atkinson v. Bell*, 8 B. & C. 277. *Grafton v. Armitage*, 15 Law J., n. s. (C. P.) 20.

completion. If a man, for instance, sends his own cloth to a tailor to be made into a coat, and the tailor furnishes the buttons, the thread, and the trimmings, the contract is nevertheless a letting and hiring of work, and not a contract of buying and selling. (d) When a contract has been entered into for the building of a house on the land of the employer, and the builder furnishes the timber, stone, and materials for the construction of the building, the contract is not a contract of sale, although it appears as if the builder sold the materials, but a contract of letting and hiring, because the land which is the principal material for the labour, and to which the building is merely an accessory, has been provided by the employer. (e) If, indeed, the builder is by the contract to provide the ground as well as the accessorial materials for the house, then the contract is a contract of purchase and sale.

A contract of this description, like all other contracts of letting and hiring, is perfected by the bare consent of the parties, so that as soon as the mutual promises are exchanged, the right to the benefit of the work passes to the workman or hirer of the job, and the right to the labour to the employer or letter of the work. If a mutual misunderstanding has arisen without any fault or want of good faith on either side, as if the workman has mistaken the meaning of the employer and made one thing when another was ordered, the contract is void, as no valid and effectual consent to bind the parties has ever been given. If there is no mutual engagement between the parties for the one to do the work and the other to provide it and pay for its execution, there is, as we have before seen, no binding contract at all, unless the engagement is under seal. (f) The workman in such a case is not bound to enter upon his task, nor is the other party bound to provide the work and pay the hire.

But we must in all cases discriminate between an executory and executed contract. When the work has been actually done, the person at whose request and by whose orders it was executed must pay for it, although the workman was originally under no legal obligation to do the work nor the employer to employ him. (g) Whenever work has been done or services have been rendered by one man at the request of another, the *prima facie* presumption, when there is no near relationship between the parties, is, as we have before seen, that the work is to be paid for by the person at whose request it has been executed. And if a man acquires and enjoys the services and skill of another, and assents to what has been

(d) Pothier, Louage d'ouvrage, No. 394.

(e) Dig. lib. 19, tit. 2, lex 22, § 2.

(f) *Eles v. Gaiward*, 5 T. R. 149. *Sykes*

v. *Dixon*, 1 P. & D. 463.

(g) *Ante*, 29, 30, 31, 35, 214, 215.

done in his behalf, this subsequent assent is equivalent to a previous authority or direction to do the act, and the party who so enjoys the benefit of what has been done in his behalf is bound to make a reasonable compensation to the workman. (h)

Work and services in preserving a lost chattel from destruction, and restoring it to the owner.—Doubts have at different times been expressed as to whether a person who has voluntarily bestowed his own labour and services, and incurred expenses in the recovery and restoration of a lost chattel to the owner, is entitled to an action to recover compensation and remuneration therefor. In the case of the recovery and restoration of shipwrecked property he is clearly entitled to such a compensation, as we shall presently see when treating of salvage, and may maintain an action for its recovery, and there seems to be no valid reason for confining this right of action to cases of salvage from shipwreck. By the civil law, the finder of a chattel who had restored it to the owner was entitled to recover from the latter a reasonable compensation for his labour and services and loss of time, and all reasonable expenses incurred in preserving and restoring the thing to the owner. But he was not entitled in any case to detain the chattel for those charges and expenses, nor to demand anything for having found it. So in our own law, the finder has no right of lien upon the property found for his trouble and expenses ;(i) but he may it seems, under certain circumstances, maintain an action to recover compensation from the owner for his labour and expense in preserving and restoring it. Thus, where a quantity of timber, placed in a dock on the banks of a navigable river, became accidentally loosened, and was carried by the tide to a considerable distance, and left at low water upon a towing path, and was there found by a stranger who removed it in his waggon to a place of safety, it was held that the finder had no lien upon the timber for the expense and trouble which he had put himself to for the carriage of it ; but the court seems to have thought that he would have been entitled, after the restoration of the timber to the owner, to maintain an action against him for his expenses and a reasonable compensation for the labour and service rendered. “The timber,” observes Eyre, C. J., “is found lying upon the banks of the river, and is taken into the possession and under the care of the defendant, without any extraordinary exertions, without the least personal risk, and, in truth, with very little trouble. It is, therefore, a case of finding and taking care of the thing found for the owner. This is a good office, meritorious at least in the

(h) *Newman v. Walters*, 3 B. & P. 616, ante, 30.

(i) *Binstead v. Buck*, 2 W. Bl. 1117. *Aliter* in cases of salvage.

moral sense of the word, and certainly entitles the party to some reasonable recompense from the bounty if not from the justice of the owner, and of which, if it were refused, a court of justice would go as far as it could go towards enforcing the payment. So it would if a horse had strayed and was taken up by some good-natured man and taken care of, till at some trouble and perhaps at some expense he had found out the owner. So it would be in every other case of finding that can be stated, the claim to the recompense differing in the degree but not in the principle." (k)

To sustain an action for the price and value of work done, and of money laid out for the benefit of another, it must be alleged and must appear from the surrounding circumstances, as we have already seen, that the work was done at the request (express or implied) of the party sought to be charged with the payment of it; and whenever lost goods have been saved and preserved by the labour and skill of the finder from destruction, and the owner has received back the goods into his possession, and assented to and approved of the measures taken, and the expense incurred by the finder, this subsequent assent to what has been done by the latter is equivalent to a precedent authority, or request, and the law would, it is apprehended, imply a promise from the owner to pay a reasonable compensation and remuneration to the finder. (Ante, ch. 7.) Thus, where a passenger on board a ship, after the flight of the captain in a small boat, took the command of the vessel, and exerted himself with great skill and courage for the preservation of the vessel, and brought her safely into port and delivered her to the owner, who formally acknowledged the value of the plaintiff's services, and expressed his belief that the plaintiff had been the means of saving the ship, it was held that the latter was entitled to a reasonable remuneration in an action for work and labour bestowed by him at the request of the defendant, the ship-owner, in and about the saving and preserving and safely delivering to the defendant the said ship and cargo. "The meritorious services of the plaintiff," observes Heath, J., "were expressly recognized in a letter from the defendant, who acknowledged that the ship was saved by the plaintiff's skill. It seems to me, therefore, to be the same as if he had given express orders to the plaintiff for his conduct. *Omnis rati habitio retro-trahitur et mandato priori æquiparatur.*" (l)

"He who receives back," observes Domat, "a thing which he had lost, is obliged, on his part, to reimburse the finder the expenses incurred by

(k) Byre, C. J., *Nicholson v. Chapman*, 2 H. Bl. 258.

(l) Heath, J., *Newman v. Walters*, 3 B. & P. 617.

him in the preservation and restoration of the thing lost, such as the expense of feeding a strayed beast which required nourishment, or the carriage and conveyance of the thing lost to some place of safety, or the expense of advertisements, or the publication of printed notices in order to give information to the owner." (m) If the owner is present and cognizant of the exertions made to recover his lost property, it will be for a jury to determine whether there was or was not an implied request on his part for the performance of the service actually rendered, and a tacit understanding between the parties that the person doing the work should be rewarded for his pains.

Honorary offices and employments.—If the employment is by custom and usage of a purely honorary and gratuitous character, the *prima facie* presumption of a letting and hiring of the services is rebutted as soon as the custom is proved and established.

ARBITRATORS.—The office of an arbitrator is deemed to be an honorary office, and a person who acts as such cannot charge for his services, unless it appears from the terms of the submission or the surrounding circumstances of the transaction that it was the intention of the parties that the arbitrator should be paid for his time and trouble. (n)

BARRISTERS and PHYSICIANS likewise exercise offices and professions of an honorary character. They are vulgarly presumed not to afford their services with any mercenary view, and cannot, therefore, maintain an action for remuneration for what they have done, unless the employer has expressly agreed to pay them. (o)

If the service appears to have been rendered as a gratuitous act of kindness, or in discharge of a public duty, the *prima facie* presumption of a contract of letting and hiring is repelled. (p) Thus, if a man undertakes a journey to become bail for his friend, (q) or attends as a witness in a court of justice, he is not entitled to be paid for his trouble. In the last case, as the attendance to give evidence is a duty of a public nature, an express promise to remunerate the witness for so doing is invalid; (r) but the witness is entitled to his expenses.

If a sailor, clerk, or servant is bound by the nature of his retainer and

(m) *Domat*, liv. 2, tit. 9, s. 2, No. 2; Dig. lib. 47, tit. 2, lex 48, § 8.

(n) Per Lord Kenyon, C. J., and per Taunton, J., *Viramy v. Warne*, 4 Esp. 47. *Burroughs v. Clarke*, 1 Dowl. P. C. 50.

(o) 2 Atk. 332. *Poucher v. Norman*, 3 B. & C. 746; 5 D. & B. 649, s. c. Per Bayley, J., *Chorley v. Bolcot*, 4 T. R. 317. *Inpscombe*

v. Holmes, 2 Campb. 441. *Veitch v. Russell*, ante, 214.

(p) As to the work and services between relations, see ante, s. 1.

(q) *Reason v. Wirdnam*, 1 C. & P. 434.

(r) *Willis v. Packham*, 1 B. & B. 515. *Moor v. Adam*, 5 M. & S. 155. *Colkins v. Godefroy*, 1 B. & Ad. 950; ante, 22.

the duties of his office to perform work of a certain character and description, and the master promises him a gratuity over and above his common wages for doing what he is by the nature of his contract bound to perform, such promise is a *nudum pactum*, (ante, 22, 23,) and the employer is under no legal obligation to fulfil his promise; but if any extra services have been rendered beyond what the workman was in strictness bound to perform, then there is a sufficient foundation for the promise, and the law will compel its faithful performance. (s)

LIABILITIES of the EMPLOYER, or LETTER of TASK-WORK.

A person who employs another by the piece or by the job, or who lets out task-work to be done for an express or implied remuneration, is bound to do every thing that is necessary to be done on his part to enable the hirer of the work to execute his engagement, and earn the hire or reward. He impliedly undertakes to preserve good faith, to resort to no misrepresentation or concealment calculated to mislead the servant or undertaker of the work, and give him a false estimate of the nature and extent of it, (t) to accept the work when completed, and to pay the customary hire and reward, in case no specific rate of remuneration has been agreed upon.

When A SPECIFIC WORK is to be done for a SPECIFIED SUM, the contract is entire and indivisible, and the employer is not bound to pay *pro rata* for a partial and incomplete performance of the work, unless he has himself prevented its completion. (u) If a contract, for example, has been entered into to build a house for a specific sum, to be paid on the completion of the building, the contract is entire and indivisible and the employer is not bound to pay for a half or a quarter of a house as the work proceeds, for "the court and jury can have no right to apportion that which the parties themselves have treated as entire, and to say that it shall be paid in instalments, contrary to the agreement, instead of, in a round sum, as provided by the agreement." (x) But when the contract does not provide for the completion of a specific job, for a specified sum, and the thing to be done is divisible and apportionable, the fair presumption then is, that the payment of the hire is to keep pace with the execution of the work, and the accrual of the benefit thereof to the employer, unless the payment is otherwise regulated by custom and the usage of

(s) *Harris v. Watson*, Peake, 102. *Stilk v. Myrick*, 2 Campb. 817; ante, 23.

(t) *Selway v. Fogg*, 5 M. & W. 86. Ante, p. 214. *Pothier, Louage*, No. 432.

(u) Ante, 194, 195, 205. *Needler v. Guest*, Aleyn. 9. *Pothier, Louage, d'ouvrage*, No. 173, 174.

(x) 2 Smith, Leadg. Cas. 12.

trade.(y) Thus, if a builder engages to build a house, to be paid for his work and labour, and the materials supplied by measure and value, or according to the customary rate of remuneration, the builder is entitled to demand payment from time to time as the work proceeds. The presumption in such a case is, that the parties intended the payment to keep pace with the accrual of the benefit, for which the payment is to be made.(z) So if a bricklayer is employed to construct a wall at so much a yard, he is entitled to be paid as the work proceeds, and may at any time cause it to be measured and demand payment; but if the wall is to be completed and approved of, and then measured and paid for, the work is not apportionable, and cannot be paid for *pro ratâ*.

When there is an absolute and unqualified refusal on the part of the employer to permit the workman to perform his task, or the employer does an act absolutely incapacitating himself from performing his part of the contract, the undertaker of the work may, if he please, rescind the contract, and he has a right upon such rescision, if he has done anything under the contract, to sue immediately for compensation on a quantum meruit. (a)

Destruction of the work before payment.—If a farrier is employed to cure a diseased horse, and enters upon his task and administers medicines, and before the cure is completely effected the horse is consumed by an accidental fire, which breaks out in the stable of the employer, the farrier must be paid for the exercise of his labour and skill and the medicines supplied, although the employer has derived no benefit or advantage therefrom.(b) But if the farrier was not to be paid *pro ratâ*, but was to receive a specific sum on the completion of the cure, and the horse was destroyed before the cure was effected, the employer would be under no legal obligation to pay him for what he had done and supplied.(c) If a labourer is employed to dig potatoes at so much an acre, or to cut turf at so much per load, or to make excavations of earthwork at so much per cubic foot, and the produce of his labour and the result of his toil are destroyed by tempest or inundation, or by accidents which have happened without any default on his part, the employer must, nevertheless, pay him the stipulated remuneration for every acre of potatoes dug up, load of turf cut, or cubic foot of earth excavated, but he would not be obliged to pay him *pro ratâ* for a proportionate part of an acre, load, or foot, in the absence of circumstances showing it to have been the intention of the parties that he should be so

(y) *Roberts v. Havstock*, 2 Smith's, L. c. 12; 3 B. & Ad. 404; ante, 196—199.
(z) 2 Smith, 12.
(a) 2 Smith's leadg. cas. 19. *Planché v. Col-*

bura, 1 M. & Sc. 51.
(b) *Wilmot J.*, 3 Burr. 1594.
(c) *Ante*, p. 196.

paid ; unless, indeed, there should have been only a partial destruction of the produce of the labour, and the employer should have derived some benefit from the work, in which case he would be liable upon a quantum meruit.

If the workman furnishes the materials for the manufacture of a chattel, as well as his own labour and skill, the contract is, as previously mentioned, a contract of sale, and if the thing perishes by accident before it is delivered, the loss will fall either upon the vendor or purchaser according as the right of property in the chattel may or may not have passed to the latter. (*Ante*, 41—45, 46.) When, on the other hand, the materials are furnished by the employer, and the workman contributes merely his labour and skill, the contract is, as we have already seen, a contract for work and labour simply, and the right of the workman to demand payment for his work in case of the destruction of the chattel by inevitable accident before it has been delivered back to the employer, depends upon the nature of the contract, and of the work, and also upon custom and usage. When the contract is entire and indivisible for the manufacture out of materials furnished by the employer of a particular chattel for a specific sum, to be paid on the completion, and delivery of the chattel to the employer, and the chattel is destroyed by inevitable accident, whilst it remains unfinished in the hands of the workman, the employer must stand to the loss of his materials, and the workman to the loss of the price and value of his labour.

If a tailor, for example, is employed to make a coat out of cloth furnished by the employer, and is to be paid for the exercise of his labour and skill on the completion and delivery of the coat, and before the coat is finished, the cloth is destroyed in the hands of the tailor by an accidental fire, the tailor has no claim against the employer for the payment of the work actually done. So if a printer is employed to print a book at so much per sheet, the price and value of the printing to be paid for on the completion of the work, and before the whole impression has been worked off and made ready for delivery, an accidental fire breaks out upon the printer's premises and consumes the work, the employer must stand to the loss of his paper, and the printer to the loss of the price and value of his labour and skill. (*d*) But if the work has been completed, and the copies have been printed and made ready for delivery, and placed at the disposal of the employer, they remain at his risk, as the right of property in the printed work has then passed to him, and if an accidental fire then breaks out and consumes them, he must stand to the loss and pay the printer his

(*d*) *Gillett v. Mawman*, 1 Taunt. 140; *ante*, 196.

hire.(e) If the price is not to be paid *in solido* on the completion of the work, and the thing to be done is divisible and apportionable, and the fair presumption is in favour of a payment to keep pace with the execution of the work, then the workman is justly entitled to a fair remuneration for the work actually done, although the employer, by reason of the accident, can never reap the benefit of it. When the work is to be paid for as it proceeds, the produce of the labour exercised upon the materials of the employer becomes the property of the latter, as each portion of work is done, and the price thereof becomes at the same time a debt due to the workman; the produce of the labour, therefore, remains at the risk of the employer to whom it belongs, and if it perishes by inevitable accident in the hands of the workman, the employer must stand to the loss, and must, notwithstanding such loss, pay the price of it.

If a chattel of the employer has been delivered to the undertaker of the work to be repaired, the accessorial materials supplied by the latter for the work, become, as we have previously seen, the property of the employer, as soon as they are attached to the chattel under repair, upon the principle that *omne accessorium sequitur suum principale*, and if the completion of the work is not made either by agreement or by custom, a condition precedent to the payment, the loss of such materials, as well as of the value of the work and labour employed upon them, is the loss of the employer and not of the workman, and the employer, consequently, must pay the hire, although he can reap no benefit from what has been done. (Ante, 197.) Thus, in the case of building contracts, where the employer furnishes the land upon which a house is to be erected, if the contract is an entire and indivisible contract for the building of the house for a specific sum to be paid on its completion, and the edifice is destroyed by lightning, or overthrown by a whirlwind during the progress of the work, the contractor must, as we have already seen, stand to the loss, and be himself at the expense of repairing the damage. But if no price is specified, and no time of payment fixed, the true and right presumption is that the work and the materials are to be paid for as the work advances, and the materials are attached to the freehold, and become the property of the employer, and if the materials and the produce of the labour perish by accident, the employer must, notwithstanding the loss, pay the price of them according to measure and value, or the customary rate of remuneration.(f)

(e) *Adlard v. Booth*, 7 C. & P. 108.

(f) Materials put together and made ready for fixing do not pass to the employer until they are

actually attached to the freehold. *Tripp v. Armistage*, 4 M. & W. 701.

If the contract price of the building is to be paid by instalments on the completion of certain specified portions of the work,^(g) each instalment becomes a debt due to the builder as the particular portion specified is completed, and if the house is destroyed by accident, the employer would be bound to pay the instalments then due, but would not be responsible for the intermediate work and labour and materials.

So in the Roman law, if a builder was employed to build a house on the land of the employer, and the building was overthrown by an earthquake, or destroyed by lightning during the progress of the work, the employer was accountable both for the materials which the undertaker of the work had furnished and for what was due on account of the workmanship, inasmuch as the materials, and the produce of the labour, became the property of the employer as soon as they were fixed to the land.^(h) But if by an express contract between the parties, the payment of the money was made conditional on the completion and approval of the building, so that nothing was due until the whole of the work had been performed, then the builder lost both the value of his materials and of his workmanship,⁽ⁱ⁾ and was bound to reconstruct the building before he called upon the employer for payment.

NONPERFORMANCE of WORK by a time specified.—If the materials for the work have been furnished by the employer, and the produce of the labour becomes, consequently, the property of the latter as the work proceeds, the non-performance of the work by an appointed time does not release the employer from his obligation to pay the contract price. He must in such a case perform his part of the engagement, and bring a cross action against the undertaker of the work to recover compensation for any damage he may have sustained by reason of the noncompletion of the work at the appointed period. Thus, in the case of a contract to build a house, where the employer furnishes the land which is the principal material for the work, if the house is not built by the time specified in the contract, but is afterwards completed, the employer who has got the house, and has had the value of his land increased by its erection thereon, can never be permitted to free himself from his obligation to pay for it by alleging that the work was not done by the time appointed. (Ante, 198.)

WORK to be APPROVED of before payment.—If a tailor undertakes to make me a coat upon the terms that I am not to take and pay for it, if, on inspection, I disapprove of the style and workmanship, I am at liberty to return the coat and refuse payment of the price, if I think fit so to do.

(g) *Tripp v. Armitage*, 4 M. & W. 687.

(h) Dig. lib. 19, tit. 3, lex 59; Dig. lib. 6, tit.

1, lex 39.

(i) Dig. lib. 19, tit. 2, lex. 36; De Aversione.

But if I engage an artist to work up my own materials, or to paint a ceiling in my house, and I have, consequently, no opportunity or power of returning him the produce of his labour, I cannot make my approval of the work, a condition precedent to his right to demand some remuneration for what he has done. (k) If a contract for the building or repairing of a house provides for the inspection and approval of the work by the employer before payment of the contract price, the employer must be afforded an opportunity of inspection before he can be called upon to pay, but he cannot by unreasonably withholding his approval after an opportunity of inspection has been afforded him, deprive the workman of his hire. (l) The employer has, indeed, a right in all cases to inspect the work before he pays for it, but his approval of it is by no means essential to the maintenance of an action by the workman. (m)

Useless and defective work.—If the work contracted to be done is a work of art and skill, and the undertaker being charged with the bare work, executes it so negligently and unskilfully as to render it utterly useless to the employer, he cannot call upon the latter for payment of it. (Ante, 193, 194.)

If a *surveyor, engineer, or architect*, for example, gives his employers a grossly incorrect estimate of the cost of certain works and engineering operations, and by so doing leads them into a great expense, which they would not otherwise have incurred, his services are worth nothing, and he is not entitled to be paid for his plans, estimates, and specifications, or for his work and labour and expenses in preparing them. "If from his negligence the whole of his work is worth *nothing*, he cannot recover for any part of it." (n)

"If a SURGEON were to require his patient to undergo an operation which should turn out to have been altogether useless or unnecessary, he could not make it the subject of a pecuniary claim or charge on such patient." (o) If a medical man ignorantly and unskilfully administers improper medicines, and the patient, consequently, derives no benefit from his attendance, the medical man is not entitled to any remuneration for what he has done; but if he has displayed the ordinary amount of skill in his profession, and has applied remedies fitted to the complaint, and calculated to do good in general, he is entitled to his hire and reward, although they may have

(k) "Ces termes, si je suis content de l'ouvrage, ne doivent pas être entendus en ce sens, que le locateur puisse être admis indistinctement à dire qu'il n'est pas content de l'ouvrage, pour se dispenser de payer la gratification promise, ce qui rendrait cette clause nulle et

illusoire." Poeth. Louage. No. 417.

(l) *Dalman v. King*, 5 Sc. 382.

(m) *Hughes v. Lenny*, 5 M. & W. 183.

(n) *Money Penny v. Hardland*, 2 C. & P. 378; 1 C. & P. 354, s. c.

(o) *Tindal. G. J.*, 5 M. & P. 544.

failed in the particular instance, such failure being then attributable to some vice, or peculiarity, in the constitution of the patient, for which the medical man is not responsible.(p)

If the workman undertakes to repair a chattel, the property of the employer, and the new work and materials are so intermixed with the old work, that the one cannot be separated from the other without injury to the chattel, and the employer consequently accepts the work, his liability to pay for it in case it has been negligently and unskilfully executed, depends upon the utility or inutility of the work. If the chattel has been benefited and rendered more valuable by what has been done, the employer must pay the fair value of the workmanship; but if it is in nowise improved, and the work done has been so negligently executed as to be worth nothing, the employer cannot be called upon for payment. If the contract is an entire and indivisible contract for the completion of certain work, such as the contract to make complete "the dilapidated chandelier for the sum of £10," previously mentioned, (ante, 194,) and the chattel is returned in an unfinished state, the employer may require the undertaker of the work to complete and perfect the article, and refuse payment of the money until it is done; and the latter cannot, so long as the contract remains open and unrescinded, and the employer has declared his intention not to accept the work in its incomplete state, maintain an action for the contract price. But if the employer has received the work, and retained the article in his possession for any length of time, without making any complaint of the defective execution of the work, he will be deemed to have accepted it, and must pay what it may be considered to be fairly worth.(q)

If the contract is for the erection of a building, or of some fixture, on the soil of the employer, and the building is so negligently constructed as to be dangerous and unfit for use, the employer may require the builder to take down the structure, and rebuild it, and is not liable to pay any portion of the contract price until that has been done. If the builder neglects so to do, and refuses to fulfil his part of the contract, the employer may give him notice to remove the materials from off the land, and may resist payment of any portion of the price of the work. If he retains the materials, and makes use of them, he will be bound to pay their fair value;(r) but if the materials are altogether useless, or the employer has suffered

(p) *Hupe v. Phelps*, 2 Stark. 480, Hancke. v. *Hooper*, 7 C. & P. 84; *Kannen v. M'Mullen*, Peake, 83.

(q) Ante, 199. L'ouvrage est censé tacite-

ment reçu, lorsque le locateur a laissé passer un temps un peu considerable sans se plaindre. Poth. Louage, No. 487.

(r) *Lucas v. Godwin*, 4 Sc. 502.

from the breach of contract on the part of the workman, more damage and injury than they are worth, he is not bound to pay anything. "If a bricklayer brings an action against his employer for work and labour done in building a wall, if he had so erected it that it would be liable to fall down shortly after its completion, he would not be entitled to recover, as the utility of the work must be looked at and considered, in order to apportion the remuneration to which the builder might be fairly entitled." (s)

DUTIES, OBLIGATIONS, and LIABILITIES of TASKWORKMEN.

Farriers and smiths, who open shops by the road side, and profess to physic and shoe the horses of all travellers, are bound, in common with common carriers, (post, ch. 24, s. 2,) and common innkeepers, (ante, ch. 22, s. 3,) to exercise their craft in favour of all who pass along the road, on being tendered the customary hire. (t)

Common ferry-men also are bound by law to convey across their ferry, at customary and seasonable hours, all travellers who present themselves, and tender, or are able and ready and willing to pay, the customary gratuity; and they are bound, moreover, to provide a boat and tackle, in good order and condition, together with able and expert boatmen, to fulfil the duties of the office. (u)

Every person who has entered into a contract for the performance of a particular task or job, is bound to enter upon his employment without delay, and be active, industrious, careful, and diligent in the performance of the work, to do it according to orders given and assented to; (x) to complete it within a reasonable period, if no time has been agreed upon for its fulfilment; and to exercise a reasonable amount of care and skill in its execution. If the work is to be performed under the direction of a surveyor to be appointed by the employer, the appointment of such surveyor is a condition precedent to the liability of the workman to commence his task; and if the surveyor is not appointed within a reasonable period, the undertaker of the work is released from his engagement to do the work. (y) In ordinary cases, the workman may accomplish the work through the medium of inferior agents and workmen; but if the work is a

(s) Tindal, C. J., 5 M. & P. 544. Ib. 548, per Alderson, J., Ellenborough, C. J. *Farnsworth v. Garrard*, 1 Campb. 37. Ante, 193, 194, 199. Pothier. Louage d'ouvrage, No. 434. (t) Keilw. 50, pl. 4. Jefferies, C. J., *Jackson v. Rogers*, 2 Show. 327, 332; Raym. 664.

(u) *Churchman v. Tunstal*, Hardr. 163; 5 T. R. 150; Sav. 14, pl. 38. *Walker v. Jackson*, 10 M. & W. 161.

(x) *Streeter v. Horlock*, 7 Moore, 287.

(y) *Coombe v. Greene*, 11 M. & W. 483. Ante, 184.

work of art and genius, and the contract is founded upon the personal talent and capacity of the artist, he impliedly undertakes to perform the work himself, and not entrust it to an inferior agent of less skill and reputation. If a portrait-painter, for example, is employed to paint a portrait, or an artist to design a ceiling, (z) he cannot, without the consent of the employer, intrust the execution of the work to a third party.

Of the implied obligation to do the work well.—Every workman impliedly undertakes to do his work well, and in a workman-like manner, and according to the rules and principles of his trade or art. "When a person is employed in a work of skill, the employer buys both his labour and his judgment; he ought not to undertake the work if he cannot succeed, and he should know whether he will or not." (a) Every workman impliedly promises his employer that he is possessed of, and will exercise the ordinary amount of skill and knowledge incident to his particular craft, art, or profession. If the work is defective, either from want of skill in the execution of it, or the insufficiency and viciousness of the materials furnished by the workman, the latter is responsible for a breach of contract. Thus where a carpenter undertook to build a booth on a race-course, and the booth fell down in the middle of the races, from bad materials and bad workmanship, it was held that the carpenter was responsible for the damage that had been sustained. (b) And if a carpenter undertakes to roof a barn, and employs defective materials, or does his work so negligently and unskillfully, that the thatch sinks and lets in the wet, he is liable for the injury to the building so occasioned. (c) So, to cite an example from the French law, "If I employ a builder to build me a new house, or repair the one I am living in, and from badness of construction, or the defective materials employed, the house falls, and destroys my furniture, the builder must make good the loss."—If I employ a carpenter to make a staircase, and the stairs are so badly constructed as to be dangerous and unfit for use, the carpenter is responsible for the damage I sustain. (d)

The employer is not, by reason of his having given evidence of the

(z) Le principe que le conducteur peut faire faire l'ouvrage par un autre, recoit exception a l'égard des ouvrages de génie dans lesquels on considère le talent personnel de celui a qui on le donne a faire; comme lorsque j'ai fait marché avec un peintre pour peindre un plafond, il ne lui est pas permis de le faire faire par un autre sans mon consentement. Poth., Louage, No. 421.

(a) Bayley, J., *Duncan v. Blundell*, 3 Stark.

7; 5 M. & P. 548. C'est de sa parte un faute de se charger d'une chose qui surpasse ses forces. Pothier, 404. No. 425.

(b) *Broom v. Davis*, 7 East, 479, n. (a) *Monypenny v. Hartland*, 2 C. & P. 378. Ante, 210, 211.

(c) *Batten v. Butler*, 7 East, 484.

(d) Pothier, (Louage,) No. 427; *Traité des Obligations*, No. 163.

breach of contract on the part of the workman, and obtained a reduction of the contract price of the work in an action brought for the recovery thereof, precluded from bringing his cross action to recover compensation for any special damage he may subsequently have sustained by reason of the negligent and unskilful execution of the work. (e)

The degree of skill and diligence which is required from the workman, rises in proportion to the value, the delicacy, and the beauty of the work, and the fragility and brittleness of the materials. The Roman law required the exercise of greater skill and diligence from workmen who undertook the delicate work of raising or removing pillars of granite and porphyry, than from those who were employed upon common materials; and greater care from a person who undertook to remove a column, than from a man who was employed in the transport of a rude block of stone. (f) So in our own law, if I hire the labour and services of shipbuilders, clock-makers, or any other artificers or handicraftsmen, they are severally bound to exercise in their respective callings superior skill and knowledge; for it is their own fault if they undertake a work of skill without being possessed of sufficient skill, or apply less than the occasion requires. If I hire the labour and services and skill of a coachman or driver of a carriage, a surgeon, a surveyor, an apothecary, a farrier, an attorney, or any other professional person, he impliedly undertakes for the possession and exercise of competent skill and knowledge in the practice of his art or profession, and is responsible for any injury I may sustain from his neglect to exercise such skill. (g)

"Every person," observes Tindal, C. J., "who enters into a learned profession, undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your cause, nor does a surgeon impliedly undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill, but he undertakes to bring a fair, reasonable, and competent degree of skill." (h) By the ancient laws of the Egyptians relating to physicians and medical men, it was provided, that if the physicians treated their patients according to the rules and regulations of the art of medicine prescribed and written down in a certain public book or register, and the patient died under their hands, they should not be answerable; but if they acted contrary to those regulations and written

(e) *Mondel v. Steel*, 8 M. & W. 858. Ante, 5 Bing. N. C. 733.

(f) Dig., lib. 19, tit. 2, l. 25, § 7.

(g) *Sears v. Prentice*, 8 East, 352. Slater
v. Baker, 2 Wils. 359. *Gladwell v. Steggall*,

(h) *Lauphler v. Phipps*, 8 C. & P. 479.

Hanks v. Hooper, 7 C. & P. 84. *Shilcock v. Parman*, ib. 289.

directions, and the patient died, then they were to be tried for their lives! (i)

But the employer himself is bound to exercise ordinary caution and discrimination in the choice and selection of the party he employs. If he selects a common quack or an unauthorized practitioner, the latter is responsible only for a reasonable and *bonâ fide* exertion of his capacity. He is bound to exercise such skill as he actually possesses, and if he has done his best and failed, he cannot be made responsible for a want of skill; for it was the employer's own fault to trust an unlearned and unskilful person, known not to be regularly and properly qualified. If the employer "voluntarily employs in one art a man who openly exercises another, his folly," observes Sir William Jones, "has no claim to indulgence, and unless the latter makes false pretensions or a special undertaking, no more can be fairly demanded of him than the best of his ability. The case which Sadi relates with elegance and humour in his Gulistan, or Rose Garden, is not inapplicable to the present subject. 'A man who had a disorder in his eyes called on a *farrier* for a remedy, and he applied to them a medicine commonly used for his patients; the man lost his sight, and brought an action for the damages;' but the judge said, 'No action lies, for if the complainant had not himself been an ASS, he would never have employed a *farrier*;' and Sadi proceeds to intimate, that if a person will employ a common mat-maker to weave or embroider a fine carpet, he must impute the bad workmanship to his own folly.'" (k)

LIABILITIES of the WORKMAN in respect of the CONSERVATION and RE-DELIVERY of chattels BAILED or DELIVERED to him to be DEALT with in THE COURSE of his EMPLOYMENT.

The liabilities of a workman, to whom chattels have been bailed or delivered to be wrought, or manufactured, or worked upon, or to be taken care of, or sold, or otherwise dealt with, in the course of his trade or employment, form part of the general law of BAILMENTS *for hire*. The term bailment, derived from the French word *bail* or *bailler*, to deliver, denotes in the common law a delivery or transfer of a chattel from one person to another, in order that something may be done with it, either for the benefit of the owner, or of the party who receives it as the temporary possessor, or for the mutual benefit of both of them, and is applied to

(i) Diod. Sic. lib. 1, c. 82.

(k) Sir Wm. Jones's Bailments, citing Rosar. Polit. c. 7.

contracts for the letting and hiring of chattels as well as to contracts for the delivery of them to workmen to be worked upon or dealt with in the course of their employment. The term is also equally applicable to contracts for the letting and hiring of realty, although it is not used in the common law to denote that class of contracts. In the French law, the term *BAIL à loyer*, or bail for hire, anciently denoted a contract for the letting and hiring of a house, or farm, or immoveable property, but in modern times, it has been applied by the French jurists to contracts for the letting and hiring of personalty as well as of realty. (l) In this class of contracts, the person who delivers the chattel for the purposes of the contract is called the *bailleur* or bailor, and the party who receives it the bailee.

LIABILITY of workmen as BAILEES for HIRE. Every workman or artificer to whom chattels have been bailed or delivered to be worked upon is responsible for all injuries that may result to the chattel from the negligent or unskilful execution of the work. Thus, if cloth be bailed to a tailor to be made into a coat, and the cloth is spoiled or injured by him or his servants in the cutting of it up, the tailor must make good the loss. If a gem, delivered to a jeweller to be set or engraved, is broken, damaged, or destroyed, the jeweller will be responsible for the loss, unless he can show that the accident arose from a defect in the material, and was not occasioned by the negligence, unskilfulness, or rashness of the artisan. (m)

Of the safe keeping of the chattel.—The bailee of chattels to be manufactured or repaired for hire is, moreover, bound to take the same care of them whilst they remain in his possession that a prudent and cautious man ordinarily takes of his own property. He is bound to exercise all reasonable and ordinary forethought and precaution for their protection and preservation, and if a loss has occurred from robbery, or from fire or inundation, (n) or from waste or decay, he must show that he had taken all such precautions as are ordinarily taken by prudent men (o) to guard against the mischief. If clothes are delivered to a fuller to be dressed, and he suffers them to be eaten by mice, he will be responsible for the loss, unless he can discharge himself from all imputation of neglect, by showing that he had been subjected to some unusual, extraordinary, and unexpected visitation from such vermin. The very occurrence of the

(l) Dict. de l'Acad. and the Encyclopédie du Droit, tit. (BAILL.)

(m) Si gemma includenda aut insculpenda, data sit, eaque fracta sit; si quidem vitio materiæ factum sit, non erit ex locato actio, si

imperitia facientis erit. Dig. lib. 19, tit. 2, lex 13, § 5.

(n) *Mensons v. Athawes*, 3 Burr. 1592.

(o) Le soin d'un diligent père de famille, Poth. 405.

disaster affords a strong *prima facie* presumption of a want of ordinary caution. (p)

A ship, bailed to a shipwright to be repaired, was put into a dry dock belonging to the shipwright on the banks of the Thames, and whilst she lay there a remarkably high tide arose and pressed against the dock gates; and it appeared that the gates might have been shored up so as to resist the pressure of the water, but the workmen were absent, and only a watchman was left to take care of the shipping in the dock. Nothing, consequently, was done, and the water at last burst open the gates and forced the bailor's vessel against another vessel and greatly injured it; and it was held that the bailee was responsible for the injury, as he might by proper precautions have guarded against the accident. (q)

Loss by robbery.—A chronometer, bailed to a watchmaker to be repaired for hire, was placed by the bailee in a drawer in his shop amongst a variety of common watches, part of which belonged to the bailee, and the rest to his customers. This drawer was locked at night. In a recess in the same room stood a strong iron chest, in which watches belonging to the watchmaker of the value of several thousand pounds were deposited and locked up. In the night the drawer was broken open by the watchmaker's servant, a youth eighteen years of age, who slept in the shop, and the chronometer was stolen by him, together with the other watches there deposited; and it was held, that as the watchmaker had taken more care of his own watches by locking them up in the iron safe than he had taken of the bailor's chronometer, and had trusted a mere lad with the protection of property of so great value, he had not exercised that amount of vigilance and care which he ought to have exercised for the preservation of the thing bailed to him, and was, therefore, responsible for the loss that had occurred. (r)

Redelivery of the articles.—If the bailee, by mistake, returns the chattel to the wrong person, and the article is lost, he is responsible for the loss. (s) Workmen in the cotton, flax, fustian, hosiery, linen, mohair, silk, woollen, and worsted manufactures, (t) and in the felt, fur, hat, hemp, leather, and iron manufactures, (u) and workmen employed in

(p) In the Roman law, proof of such a disaster was held to be proof of negligence. "Si fullo vestimenta polienda acceperit: eaque mures roserint, ex locato tenebitur, quis debuit ab hac re cavere. . . . Poterat ea res in locum tutiorem transferre. Dig. lib. 19, tit. 2, lex 13, § 5.

(q) *Lock v. Maestaer*, 1 Campb. 187.

(r) *Clark v. Earnshaw*, Gow. 88.

(s) *Wilson v. Powis*, 11 Moore, 546. *Lubbock v. Inglis*, 1 Stark. 104. *Lilley v. Barnsley*, 1 Car. & Kerw. 344.

(t) 6 & 7 Vict., c. 40.

(u) 22 Geo. 2, c. 27, and 17 Geo. 3, c. 56.

making clocks and watches, (*x*) boots and shoes, (*y*) who pawn, sell, purloin, embezzle, secrete, exchange, or fraudulently dispose of the materials given them to work upon in the way of their trade, or neglect to return such materials to their employers, are liable, on conviction before justices of the peace, to be fined and imprisoned. (*z*)

LIABILITIES of WAREHOUSEMEN and WHARFINGERS, AGISTERS of CATTLE, FACTORS, and BAILIFFS.—All persons to whom goods and chattels are delivered to be kept for hire and reward, and who are paid expressly and specifically for the exercise of their labour and care in keeping them, and not merely for the finding of a place of deposit, are bound to exercise the utmost care and vigilance for their preservation, which may be defined to be the amount of care which the most prudent and careful of men exercise for the protection of their own property. (*a*) It has been held, indeed, by Lord Kenyon in one or two *nisi prius* decisions, that a person to whom goods have been bailed to be kept, and who is paid expressly for the keeping of them, is bound to take only ordinary care of them and keep them as he keeps his own goods. Thus, where an officer in the army being about to leave London delivered a trunk containing divers articles of value to an upholsterer to be kept for a shilling a week, to be paid by the latter, and the trunk was returned to the officer emptied of its contents, which were alleged to have been stolen by some person unknown, it was held by Lord Kenyon that the upholsterer was bound only to take as much care of the goods as he took of his own, and was not responsible for the loss. (*b*) So where merchandize contained in a box was delivered to a warehouseman to be kept for hire, it was held, that the warehouseman was bound to exercise only "common diligence" for its preservation. (*c*)

A man who undertakes to find only a place of deposit (*ante*, ch. 22, s. 3,) ought certainly to be responsible for no more than that ordinary watchfulness which may be requisite to secure his warehouses from ordinary and extraordinary hazards. But when the thing is delivered into his hands to keep, and he is paid for his care and labour in keeping and preserving it, he ought to be clothed with a greater liability and to exercise more care than a mere gratuitous bailee who receives no reward for his services, and who is, as we shall presently see, (*post*, ch. 25,) bound to take the same amount of care of things intrusted to him to keep as he

(*x*) 27 Geo. 2, c. 7.

(*y*) 9 Geo. 1, c. 27.

(*z*) Burn's Justice by Chitty and Bere, (SEVENTH, s. 2.)

(*a*) Quod si horrearius *nominatim* custodiam mercium in se recepit, videbitur locasse operas non

solum exactæ sed etiam exactissimæ, custodiæ. Pandect. Just. ed. Poth. Lib. 19, tit. 2, art. 3, 72.

(*b*) *Finucane v. Small*, 1 Esp. 315.

(*c*) *Cailiff v. Danvers*, 1 Peake, N. P. C. 155.

has ordinarily taken of his own property. It is laid down by the French law, that "he who undertakes to keep a thing for a certain price ought to preserve that which is intrusted to him with all the care that is possible to be taken by persons the most watchful and diligent, and if for want of such care the thing perishes by accident, the undertaker is accountable for the loss. (d) And it is submitted, that according to the spirit of the recent decisions in our law, a bailee who receives a chattel into his possession to keep, and is paid for the keeping of it, is bound to exercise more than ordinary care and common diligence for its preservation, and that he will be responsible for any neglect causing the loss of the chattel. It is no answer to an action against a warehouseman for the non-delivery of a chattel intrusted to him to keep for hire, to say that he has lost it, (e) the mere fact of the loss is *prima facie* proof of negligence, and he must rebut this *prima facie* presumption by showing that he had taken the utmost care of the thing entrusted to him, and had no means of preventing the loss. A very sensible distinction is taken in the civil law between a public palpable robbery by force and violence when a house is broken into and rifled of its contents, and a theft or secret purloining of goods. In the one case, the bailee relieved himself from responsibility for the loss by proof of the mere fact of the robbery; (f) (it being considered that individual care or vigilance could avail but little against the open attack of the determined robber;) (g) in the other, he was bound to make good the loss, unless he could show that he had taken the greatest care of the thing entrusted to him, and that it had been purloined, notwithstanding every precaution for its safety. (h)

If the owner himself in any way conduces to the loss; if he brings people to the warehouse or place of deposit to look at the goods, opens packages in which they are contained, and the loss is as likely to have arisen from the misconduct of the persons so introduced, or from the carelessness of the owner, as from the neglect of the warehouseman or bailee, the latter is not responsible for the loss. Thus, where a quantity of ginseng contained in a box was deposited by the plaintiff in the defendant's warehouse, and the plaintiff was in the habit of resorting to the box and ordering the lid to be taken off for the purpose of showing

(d) Pothier, (Pret a Usage,) art. 53.

(e) *Cairns v. Robins*, 8 M. & W. 258.

(f) Dig. lib. 17, tit. 2, lex 52, 53. Instit. lib. 3, tit. 15, § 2, 3.

(g) *Adversus latrones* parum prodest custodia; *adversus furem* prodesse potest si quis advigilet. Gothofred. Jur. Civ.

(h) *Ad casus autem fortuitos non sunt referendi illi casus, qui cum culpa conjuncti esse solent; cujusmodi sunt furtiva. Quamobrem, qui rem furto amissam dicit, is diligentiam suam probare debet.* Vin. Com. ad. Instit. lib. 3, tit. 15, § 5. Pothier, (Pret a Usage,) art. 53. *Robinson v. Ward*, Ry. & Mood. 276.

the ginseng to expected purchasers who came to the warehouse to view it on the invitation of the plaintiff, and rats at last got into the box and destroyed the ginseng; it was held that the defendant, the warehouseman, was not responsible for the loss. (i)

Wharfingers.—The duties and responsibilities of the wharfinger, in respect of the safe keeping of the goods entrusted to him, to be dealt with in the way of his trade, are analogous to those of the warehouseman. If he receives directions to ship them on board a particular vessel, he does not discharge his duty by delivering them to one of the crew; but he is bound to place them in the hands of the captain or some person in authority on board the vessel. (k) If he is clothed merely with the custody of the goods, and the duty of shipping them devolves upon the master of the vessel to which they are to be sent, the wharfinger is discharged from responsibility as soon as he has placed them in the possession and under the care of the masters and officers of such vessel, although they are not actually removed from the wharf. (l)

Agisters of cattle.—By the civil law and modern codes founded thereon, a person who receives cattle or horses or living animals to keep for the owner, and is paid expressly for his care and watchfulness in preserving them, as well as for their sustenance, is bound to take the utmost care of them, and he is responsible for damage and injury resulting from ordinary casualties if such damage might have been averted and prevented by the exercise of great care and vigilance. In our own law, it is said that the bailee is responsible only for ordinary and common care, which is the amount of care that a mere mandatary, or person who undertakes to feed and to keep living animals gratuitously, is bound to take of the beasts committed to his keeping (post, ch. 25, s. 2). Very slight evidence of neglect has, however, been sufficient to induce juries to return verdicts in favour of those who have sought compensation for the loss of cattle delivered to bailees to be kept for hire. Thus, where the defendant, a farmer, had received the plaintiff's horse to agist for a certain price, and the horse strayed and was lost and never after heard of, and the plaintiff gave evidence of the gates having been occasionally seen left open, and the fences being in parts out of order, but it did not appear that the horse had strayed through any defect in the fences, or through any of the gates having been left open, the jury, nevertheless, returned a verdict against the defendant for the full value of the horse. (m) If the bailee leaves

(i) *Cailiff v. Danvers*, 1 Peake, N. P. C. 155.

(k) *Leigh v. Smith*, 6 C. & P. 638, 641; 2 Esp. 695.

(l) *Corbin v. Downe*, 5 Esp. 41; Story's Bailments, 293; Sir Wm. Jones, 97.

(m) *Broadwater v. Blot*, Holt, 547.

open the gates of his fields, or suffers his fences to be defective, or puts the horse into a dangerous pasture, and the horse by reason thereof is lost or injured, this is a degree of neglect for which he is undoubtedly responsible. (n)

Livery stable keepers.—A livery stable keeper, to whom a horse is bailed to be kept for hire, impliedly undertakes to provide a stable reasonably wind and water tight, also a proper quantity of wholesome food for the horse, and a hostler who has a reasonable knowledge of horses, and is reasonably fit for the duties of his situation. He is bound moreover to give the horse proper air and exercise, to have it dressed and cleaned, and to exert himself with care and diligence to protect the horse from cold and wet, and from all ordinary and extraordinary hazards.

FACTORS to whom goods have been bailed to be sold for the owner, and who receive a commission, or a per centage upon the price, by way of hire or reward for the exercise of their skill and labour in the commission entrusted to them, are bound to employ the same care in the custody and safe keeping of the goods as an ordinary hirer of chattels for use, or a bailee to whom chattels have been bailed to be worked upon, repaired, or manufactured. He is not bound to take the greatest amount of care that is ever taken of property of the description bailed to him, as he is not paid particularly and especially for his safe custody of the goods, but for his labour and services in selling them. It is sufficient, therefore, if he does all that a man of average prudence is wont to do in the care of his own goods. "Though he is to have a reward for his management, yet he is only to do the best he can; and if he be robbed, &c., it is a good account . . . if he receives his master's money and keeps it locked up with reasonable care, he shall not be answerable for it if it be stolen. (o)

LIEN of workmen and bailees.—Workmen who have bestowed their labour and skill in manufacturing or repairing a chattel, have a lien thereon for their hire. A farrier who cures a horse of a disease, and the horse-breaker by whose skill the horse is rendered manageable, have liens; (p) but livery-stable keepers and agisters of cattle have no lien for the price of the food of beasts committed to their keeping. (q) Warehousemen and wharfingers have sometimes a lien by custom. (r)

(n) *Mosley v. Fosset*, 1 Roll. Abr. 4, per Popham, C. J.

(o) Per Holt, C. J. *Coggs v. Bernard*, 2 Raym.

(p) And so also has the owner of a stallion to whom a mare has been delivered to be got with foal. *Scarfe v. Morgan*, 4 M. & W. 283.

(q) *Chapman v. Allen*, Cro. Car. 271. *Jackson v. Cummins*, 5 M. & W. 342. *Judson v. Etheridge*, 1 Cr. & M. 746. *Sanderson v. Bell*, 2 C. & M. 304.

(r) *Rex v. Humphrey*, M'Clel. & Y. *Leuchart v. Cooper*, 1 Sc. 481; 7 C. & P. 126; 4 M. & Gr. 574.

CHAPTER XXIV.

CONTRACTS FOR THE LETTING AND HIRING OF THE WORK OF CARRYING.

SECTION 1.—*Charter parties and contracts of affreightment.*—Liabilities of the owners and masters of ships upon charter parties and bills of lading—Liabilities of the charterer or shipper—Payment of freight—Shipowner's lien for freight—Abandonment of a damaged cargo—Payment of demurrage—Payment of primage and average—General average and contribution—Salvage.

SECTION 2.—*General duties, obligations, and liabilities of carriers for hire, not being common carriers.*—Contracts for the letting and hiring of the work of carrying—Carriage of merchandise on the high seas—Liabilities of ship owners and masters of ships as carriers and bailees for hire—Damage or loss of goods by the way—Loss by robbery, fire, or accident—Loss by the act of God, the perils of the sea, and the dangers of navigation—Loss by fire—Delivery of the goods to the consignee—Limitation of the responsibility of owners and part owners of ships, by statute—Liabilities of persons who undertake the work of carrying by land for hire, not being common carriers.

SECTION 3.—*Liabilities of common carriers.*—Definition of a common carrier—General duties, obligations, and liabilities of common carriers—Common carriage of passengers by coach—Carriage by railway—Common carriers of goods—Liability of common carriers for losses of goods by robbery—Losses by fire and inevitable accident—Damage to goods by the way—Limitation of the common carrier's liability by express contract, and by act of parliament—Carrier's notices—Carrier's act.

SECTION I.

CHARTER PARTIES AND CONTRACTS OF AFFREIGHTMENT.

Charter parties and contracts of affreightment made between the owners or the master of a vessel on the one hand, and the charterer on the

other, do not amount in general to a demise or bailment of the ship to the charterer, so as to clothe him with the possession of the vessel, but to a contract for the use of the ship, together with the services of the master and crew for the conveyance of merchandize. The contract, therefore, is ordinarily a contract for the letting and hiring of the work of carrying merchandize, (post s. 2.)

If the end sought to be attained by a charter party can be accomplished without a transfer of the possession of the vessel to the charterer, the courts will not give effect to the contract, as a demise of the ship, although there may be express words of grant and demise. "The words granted and taken to freight," observes Burrough, J., "used in the beginning of the charter party, have been assimilated to those of demises in leases of land; but it appears to me that no analogy can be drawn between them, for the subject matter in each is of a wholly different nature. In the case of a lease, the party must be the actual possessor of the land, as he takes it for the purpose of cultivation. So with respect to a lease for a house, he takes it for his actual residence, and it is necessary in both instances that he should have the exclusive possession. It by no means follows, that although words of this description are introduced in a charter party that the possession of the whole of the vessel should thereby pass to the charterer." (a)

If, however, the nature of the service, and the due attainment of the object sought to be accomplished, requires the vessel to be absolutely under the control, and subject to the orders and directions of the charterer; if she is to be employed in warfare, or in the fishing or coasting trade, or as a general ship for the conveyance of merchandize by the charterer for third parties, (Post. s. 3.) and is to be at the general disposal of the latter to sail upon any service that he may require, the courts will give effect to the contract as a demise of the ship. (b) In this case the contract is a contract for the letting and hiring of a chattel, and belongs to the class *LOCATIO REI*. (ante, ch. 22, s. 2.) The services of the master and crew pass as merely accessorial to the principal subject matter of the contract; they attorn as it were to the charterer and become temporarily the servants of the latter, bound to obey his orders. (c)

LIABILITIES of the SHIPOWNERS and MASTER upon the ordinary form of CHARTER PARTY and BILL OF LADING.—In charter parties of affreight-

(a) Burrough, J., *Christie v. Lewis*, 5 Moore, 258. 2 B. & B. 410, s. c. *Saville v. Campion*, 2 B. & Ald. 510. *Parish v. Crawford*. Abbott on Shipping, 32. *Dean v. Hogg*, 4 M. & Sc. 195.

(b) *Trinity House v. Clerk*, 4 M. & S. 295, 299. *Hutton v. Bragg*, 7 Taunt. 14.

(c) *Belcher v. Capper*, 5 Sc. N. B. 316; 4 M. & Gr. 502. *Thompson v. Small*, 1 C. B. 358.

ment, the ship owner usually covenants for the use of the ship by the charterer for a particular voyage or adventure. The customary stipulations are, that the ship shall be tight and staunch, and well equipped and manned, and furnished with all the necessaries for the voyage; that she shall be ready by a day appointed to receive the cargo, and shall wait a certain number of days to take it on board, and after lading shall sail with the first fair wind for the destined port, and there deliver the goods in proper order and condition to the order of the charterer; and further, that during the continuance of the voyage the ship shall be tight and staunch, and furnished with sufficient men, and other necessaries, to the best of the owner's endeavours.(d)

In order to determine who is the proper person to be sued upon a contract of affreightment, it must be ascertained whether the contract is, or is not, under seal. If the parties have contracted by deed, the action can only be brought against those who have executed the instrument and covenanted therein in their own names, or by some known title or description. If the charter party contains covenants both on the part of the owners and the master for the conveyance of the cargo and has been executed by both, the action may be brought either against the one or the other at the election of the covenantee. If it has been entered into and executed by the owners alone, they alone can be made liable upon it, whilst if the master is the only executing party, he alone can be sued thereon, although the deed may be expressed to be made by him for and on behalf of his employers, the shipowners. (ante, 370, 393). In order to charge the owners upon a charter party under seal entered into and executed for them by the master of the ship, it must be shown that the master was authorized by power of attorney under seal to bind the owners by deed, (e) the covenants moreover must be expressed to be made by the owners themselves, and not by the master on their behalf, and the deed must be executed by the master in the name of the owners, as in the case of the execution of an ordinary deed by an agent for his principal (ante, 393). If the master covenants in his own name, the contract is, as we have before seen, exclusively the contract of the master. He constitutes himself in such a case the carrier of the goods, and becomes personally responsible upon the express covenants contained in the charter party, and also upon all such implied covenants and engagements as result from the contract and the nature of the employment.

(d) As to the construction of charter parties, see ante, 184, 143—158. And of an authority to the master to make alterations in the charter party, and alter the destination of the vessel.

Wiggins v. Johnstone, 14 M. & W. 622.

(e) *Horsley v. Rush*, cited 7 T. R. 209. ante, 9, 393.

Bills of lading.—When the use of an entire vessel, or of a certain amount of stowage therein, has not been contracted for, but the merchant merely sends certain parcels or packages of goods on board, to be conveyed to the port of destination, the master or commander of the vessel, or some person acting for him, usually gives a receipt for them, and the master afterwards signs and delivers to the merchant sometimes two and sometimes three parts of a bill of lading, of which the merchant commonly sends one or two to his agent, factor, or other person to whom the goods are to be delivered at the place of destination; that is, one on board the ship with the goods, another by the post or other conveyance, and one he retains for his own security. (f) The bill of lading is a written or printed memorandum, signed by the master, acknowledging the shipment of the goods on board, and promising to deliver them at the port of destination to a person named as the consignee, or to his assigns, on payment of freight, primage and average, “the act of God, the king’s enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted.” The master who thus acknowledges the receipt of the goods, and promises to carry and deliver them, is personally responsible for the fulfilment of his engagement, (g) and the shipowner who receives the fruit and earnings of the ship is also liable upon the bill of lading, although he is not named therein. (h)

LIABILITIES *of the* CHARTERER *or* SHIPPER *on* CHARTER PARTIES *and*
SIMPLE CONTRACTS *and* BILLS OF LADING.

Payment of stores furnished for the use of the vessel.—If the charter party operates as a demise or bailment of the ship to the charterer, so as to clothe him with the possession as well as the use of the vessel, and constitute him the temporary owner, the master becomes the agent of the charterer and the latter, and not the registered owners, is then responsible for stores ordered for the use of the vessel by the master in the course of his employment by the charterer. “To say,” observes Lord Ellenborough, “that the registered owner who divests himself by the charter party of all control and possession of the vessel for the time being in favour of another who has all the use and benefit of it, is still liable for stores furnished to the vessel by order of the captain during the time, would be pushing the effect of the register acts much too far.” (i)

(f) Abbott on Shipping, by Serjt. Shee, 279.

(g) Domat. lib. 1, tit. 16, s. 2.

(h) *Cannan v. Meaburn*, 8 Moore, 127. *Gosling v. Higgins*, 1 Campb. 451.

(i) *Fraser v. Marsh*, 13 East, 288; 8 & 9 Vict. c. 89. *Briggs v. Wilkinson*, 7 B. & C. 34; 9 D. & R. 871, s. c.; Lord Denman, 1 Ad. & E. 312.

Payment of the freight or hire.—When the charter party amounts to a demise or bailment of the vessel at a certain rent or hire, to be paid at stated periods to the shipowners, and the vessel has been placed at the disposal of the charterer, the latter is responsible for the payment of the hire, although he makes no use of the vessel, and the contemplated voyage is never performed. But when the charter party amounts merely to a contract for the conveyance of merchandize to a specified destination, and contains covenants or promises for the performance of the voyage, and of the work of carrying on the one side, and payment for the work on the other, the fulfilment of the covenant or undertaking to carry the goods, is naturally a condition precedent to the payment of the work, so that the plaintiff must of necessity shew the work done, or that he was hindered from doing it by the defendant before he can demand the money. (k) The freight may, however, by the special contract of the parties, be made payable on the delivery of the goods on board, prior to the performance of the voyage, or at any other period of time which they may choose to appoint. (l) But in all cases of doubtful construction, the courts will adhere to the maxim that the freight is not due until it has been earned by the performance of the work for which it is to be paid. (m)

If freight is paid in advance and the cargo is lost, the freight so paid cannot, it seems, be recovered back, (n) unless the loss has been occasioned by negligence or misconduct, or want of skill in the navigation of the vessel.

When the charterer engages to pay so much per month, week, or day of the voyage, or of the ship's employment, and no time is fixed for the commencement of the computation, his liability for the freight will begin on the day that the ship breaks ground and commences the voyage, and will continue during all unavoidable delays for provisions, repairs, &c., not occasioned by the negligence or misconduct of the master or owners. (o) The month is always understood to be a calendar, and not a lunar month, and the freight becomes due at the expiration of each month, or other interval of time limited by the parties for its payment, (p) whether the ship does or does not ultimately arrive at her place of destination.

(k) *Tate v. Meek*, 2 Moore, 291. *Campion v. Calvin*, 3 Sc. 350. Ante, 198, 190, 191. Pothier, *traité de la charte-partie*, part 1, s. 3, § 2.

(l) *Eldon, C. J.*, 2 B. & P. 322. *Andrew v. Moorhouse*, 5 Taunt. 438; 1 Marsh, 122. *De Silvale v. Kendall*, 4 M. & S. 42. Ante, 202, 203. *Crosier v. Smith*, 1 Sc. N. R. 347.

(m) *Mashiter v. Buller*, 1 Campb. 184. Ab-

bott, C. J., 4 B. & Ald. 585. *Visserboom v. Chapman*, 18 M. & W. 230.

(n) *Saunders v. Drew*, 5 B. & Ad. 450. *De Silvale v. Kendall*, 4 M. & S. 37.

(o) *Havelock v. Godden*, 10 East, 566. *Ripley v. Scasfe*, 5 B. & C. 169.

(p) *Jolly v. Young*, 1 Esp. 86. *Lutwidge v. Gray*, Abbott, 394.

If the covenant or promise to pay freight be entire for the conveyance of a full cargo of merchandize for a specific sum, the charterer is not bound to accept and pay for half a cargo, but if he agrees to pay by the bale or cask, or at the rate of so much a ton, he is bound to accept and pay for what has been actually brought and tendered to him. (g) He must pay, also, in all cases, for such goods as he actually accepts, and if he accepts goods short of the port of destination, he is liable upon an implied contract to pay *pro ratâ itineris peracti*. (r) This apportionment usually happens when the ship, by reason of some disaster, goes into a port short of the place of destination, and is unable to prosecute and complete the voyage. (s)

When the charterer merely covenants to pay freight at the rate of so much a ton, &c., for the goods he shall lade on board, and does not covenant to furnish any particular quantity of goods, he is of course only liable for the quantity of goods actually shipped. (t) But if he contracts for the use of the entire ship, or part of a ship, or for a certain specified tonnage, the payment of freight must be proportioned to the amount of tonnage, space, or accommodation he has contracted for. If, therefore, he has contracted for the use of the entire ship at so much a ton, the payment must be according to the number of tons which the ship is proved to be capable of containing, without regard to the quantity of merchandize actually put on board by the charterer. If the burthen and tonnage of the ship be set forth in the charter party, and the charterer covenants to pay freight according to the tonnage therein specified, the amount of freight payable is, of course, regulated by the number of tons enumerated, but if the charterer covenants to ship on board a full and complete cargo, and to pay so much a ton for every ton loaded on board, he is bound to put on board and to pay freight for as much as the ship will hold, and safely carry whatever may be the amount of the burthen and tonnage of the vessel, mentioned in the charter party. A misdescription of the ship's burthen does not in such a case exonerate the charterer from the liability to ship on board, and to pay freight, for a full and complete cargo, provided the charterer has had an opportunity of examining the ship and forming his own judgment of her capacity, and there has been no fraudulent misrepresentation or concealment of the truth. (u)

(g) *Christy v. Row*, 1 Taunt. 314. Ante, 186, 190—192, 194—197.

(r) *Lube v. Lyde*, 2 Burr. 889.

(s) *Vlierboom v. Chapman*, 13 M. & W. 230.

(t) *Lady James v. B. I. Company*, Abbott,

365.

(u) *Hunter v. Fry*, 2 B. & Ald. 424. *Thomas v. Clarke*, 2 Campb. 452. *Moorsom v. Page*, 4 Campb. 103. *Irving v. Clegg*, 1 Bing. n. c. 51.

A covenant to provide a full cargo for a ship at certain rates of freight, applies exclusively to goods and merchandize, so that human beings and their passage money cannot be included under the term "cargo." (x) If the charterer or freighter has been prevented by inevitable accident from fulfilling a covenant of this description, and from furnishing a loading, which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, but must answer in damages." (y)

Shipowner's lien for the freight.—If the shipowners have by the charter party divested themselves of the possession of the vessel in favour of the charterer, they have, of course, no lien upon the goods shipped on board, and cannot take possession of them and detain them as a security for the rent or hire agreed to be paid for the use of the vessel. (z) But if the charter party does not amount to a bailment of the ship, but the shipowners keep possession of the vessel, and contract merely to carry merchandize for the charterer for certain freight, the delivery of the goods and the payment of the freight constitute mutual conditions to be performed at the same time, (ante, 201, 202,) so that the shipowner may retain the cargo until he is tendered payment of the freight. (a) When, however, by the terms of the contract credit is given for the payment of the freight; if it is to be paid a month or three months after the arrival of the ship, the carrier must forthwith deliver the goods, and rely on the subsequent performance by the charterer of his contract to pay, (b) and if the latter becomes bankrupt prior to the arrival of the vessel at the port of destination, his assignees are entitled to demand the goods, and the shipowners cannot claim any lien upon them for freight.

Payment of freight under bills of lading.—"If a person receives goods in pursuance of a bill of lading, in which it is expressed that the goods are to be delivered to him, he paying freight, he by implication agrees to pay freight," (c) and may, consequently, be sued therefor, either by the master or the shipowner, unless he is a mere agent receiving the goods on behalf

(x) *Lewis v. Marshall*, 7 M. & Gr. 744, 745. As to the notice to be given of the vessel's being ready to receive cargo, *Fairbridge v. Pace*, 1 Car. & Kirw. 317.

(y) *Ellenborough, C. J., Barker v. Hodgson* 3 M. & S. 270. Ante, 192. *Graham v. Hays*, 2 Sc. N. R. 471.

(z) *Belcher v. Capper*, 5 Sc. N. R. 316; 4 M. & Gr. 502. *Thompson v. Small*, 1 C. B. 353.

(a) *Saville v. Campion*, 2 B. & Ald. 503. *Campion v. Colvin*, 3 Sc. 338; 3 Bing. N. S. 17, s. c. *Tate v. Meek*, 2 Moore, 293.

(b) *Alsager v. St. Cath. Dock Co.* 15 Law J., N. S. (Exch.) 34; 14 M. & W. 794, s. c. *Lucas v. Nockells*, 1 M. & P. 801. *Thompson v. Small*, 1 C. B. 354; 14 Law J., N. S. (C. P.) 157; ante, 202—204.

(c) *Tenterden, C. J., Skiffe v. Tobin*, 3 B. & Ad. 528. *Roberts v. Holt*, 2 Show. 443. *Cock v. Taylor*, 13 East, 402. *Wilson v. Kymor*, 1 M. & S. 168. *Bell v. Kymor*, 1 Marsh, 149; 5 Taunt. 477. *Coleman v. Lambert*, 5 M. & W. 502. *Dougal v. Kemble*, 3 Bing. 390. *Pinder v. Wilks*, 5 Taunt. 612.

of a known principal, (d) and unless the goods have been shipped on board under a charter party of affreightment; by which the charterer himself has covenanted to pay the freight. (e)

When the goods are made deliverable on payment of freight, the delivery and the payment constitute (as we have already seen) mutual conditions to be performed at the same time, so that the master is not bound to deliver the goods until he has received or been offered the freight. If he does not think fit to insist on his right of detention, but delivers the goods to the consignee, and the latter afterwards refuses to pay the freight, or pays the master by a bill of exchange, which turns out to be worthless, the master may resort to the consignor or shipper for payment, (f) unless he has for his own convenience and accommodation preferred a bill, when he might have had cash. (g) Payment to the shipowners on their demand is a discharge against any claim by the master, and on the other hand, payment to the master in the absence of any notice from the owners to withhold it, is a valid payment as against them. (h)

Abandonment of a damaged cargo.—If the goods or the cargo laden on board have been greatly damaged by perils of the sea, and the dangers and accidents of navigation, and are not worth the amount of freight agreed to be paid, the charterer or shipper cannot, it seems, abandon them and refuse to pay the freight as he is permitted to do by the maritime laws of some continental states, but must fulfil his part of the contract, and pay for the conveyance of the goods, although the work of carrying has, by reason of inevitable accident, been of no benefit or advantage to him. (i)

Payment of demurrage.—The charterer usually covenants or promises to load or unload the vessel within a certain time, or if he fails so to do, to pay so much per diem during the delay. This payment, as well as the delay itself, is called in mercantile and legal phraseology, *demurrage*. When demurrage is stipulated to be paid, the charterer cannot escape from liability upon his express covenant or promise, by showing that the delay was occasioned by some unforeseen event, such as the crowded state of the docks, the delays of Custom-house officers, or the inclemency of the weather. (k) But if the delay is occasioned by the wrongful and unauthorized interference of the shipowner himself with the unloading of the cargo,

(d) *Amos v. Temperley*, 8 M. & W. 805.

(e) *Moorson v. Kymer*, 2 M. & S. 316.

(f) *Christy v. Row*, 1 Taunt. 314. *Tapley v. Martens*, 8 T. R. 453. *Sheppard v. de Bernales*, 13 East, 572. *Domett v. Beckford*, 5 B. & Ad. 514. *Tobin v. Cranford*, 5 M. & W. 235; 9 M. & W. 716, a. c.

(g) *Strong v. Hart*, 6 B. & C. 160.

(h) *Smith v. Plummer*, 1 B. & A. 575. *Atkinson v. Colerworth*, 3 B. & C. 648.

(i) Abbott on shipping, 380, 387.

(k) *Blight v. Page*, 3 B. & P. 295, n. *Barrett v. Dutton*, 4 Campb. 333.

the detention is not then the detention of the charterer, and the ship-owner cannot claim demurrage in respect thereof. (*l*)

The period from which the lay days count, "is from the time the vessel arrives in the dock, and is in the management of the dock companies' or harbour master's officers; and when neither is to blame for delay, the number of days run from the time when the ship is in a dischargeable state; and if no period is mentioned, the cargo is to be discharged in a reasonable time, to commence from the time when the ship is in a state to begin delivering."(*m*) Where £5 per diem demurrage was stipulated to be paid, "to reckon from the time of the vessel being ready to unload, and in turn to deliver," it was held that the words "in turn to deliver" applied to the public rules and regulations of the port of discharge, and that the charterers were not liable for the payment of demurrage until their "turn to deliver" had come, in conformity with the regulations of the port. (*n*) If after the loading has been completed, the vessel is detained by a sudden frost, (*o*) or by foul weather and contrary winds, no right to demurrage arises by reason of such detention. (*p*)

The days mentioned in the clause of demurrage are understood, it is said, by the custom of the port of London, to be working days, and do not consequently include Sundays and Custom-house holidays. (*q*) There does not, however, appear to be any general custom to this effect. (*r*) The lay days allowed are, moreover, to be reckoned from the time of the ship's arrival at the usual place of discharge, and not on her arrival at the entrance of the port; although for the purposes of navigation she may have discharged a portion of her cargo at the entrance of the port. (*s*) If the parties, by mutual consent, substitute a new port for the port mentioned in the contract of affreightment, the freighter will be entitled to the lay days, and the shipowner to the demurrage stipulated for by the original contract. (*t*)

If a consignee accepts goods under a bill of lading, at the bottom of which is a memorandum, to the effect that the ship is to be cleared within a certain time, and that demurrage, at the rate of so much per annum, is to be paid after that day, the consignee will be liable for the payment of such demurrage, and may be sued therefore by the master. (*u*)

(*l*) *Benson v. Blunt*, 1 Ad. E. n. s. 870.

(*m*) *Alderson, B., Brown v. Johnson*, 1 Car. & Marsh. 447; 10 M. & W. 331, s. c.

(*n*) *Robertson v. Jackson*, 15 Law J. n. s. (C. P.) 28; 2 C. B. 412, s. c.

(*o*) *Pringle v. Mollett*, 6 M. & W. 83.

(*p*) *Jamieson v. Laurie*, 6 Bro. P. C. 474.

(*q*) *Cochran v. Retbury*, 3 Esp. 121.

(*r*) *Brown v. Johnson*, 10 M. & W. 334.

(*s*) *Breardon v. Chapman*, 7 Bing. 559. *Brown v. Johnson*, 10 M. & W. 334. *Kell v. Anderson*, ib. 498.

(*t*) *Jackson v. Galloway*, 6 Sc. 792; 7 King. 562, s. c.

(*u*) *Jesson v. Solly*, 4 Taunt. 54.

Payment of primage and average.—The freighter, whose goods and merchandize have been duly conveyed to the port of destination, is also liable for the payment of certain small customary charges called primage and average. The first is a small customary payment to the master for his care and trouble, and the second of several petty charges, such as towage, beaconage, pilotage, &c. (x)

General average and contribution.—By the ancient laws of the Rhodians, it was provided, that if several persons had laden goods on board a ship, to be carried for hire, and the goods of one of them were thrown overboard in a storm to lighten the vessel, and save her from perishing, the loss incurred for the sake of all should be made good by the contribution of all. (y) This equitable rule of law was adopted by the Romans, and has been introduced into the maritime code of continental Europe. It is said to have been engrafted upon our own common law by the Normans, and has certainly existed as a custom amongst merchants in this country from a very early period. The obligation to contribute which is deemed by the common law to be tacitly entered into by the shipowners and owners of the cargo, is called general or gross average, and the parties subject thereto are bound to contribute rateably according to the value of their several proportions of the property saved.

The law of contribution is thus explained by Domat in his Treatise on the Civil Law:—"When, in order to lighten a ship in peril of shipwreck, part of the cargo is cast into the sea, and the ship by that means is saved, this loss is common to all those who had anything to lose in that peril. Thus the master of the ship, all those whose merchandize or effects have been saved, and those whose goods have been thrown overboard, will each bear their share of the loss, in proportion to the share they had in the whole. If, for example, the ship and the whole cargo were worth 100,000 crowns, and that which was cast overboard was worth 20,000 crowns, the loss being a fifth, each will contribute a fifth part of the value of what he has saved, which will make in all 16,000 crowns; and by this contribution, those who having lost the 20,000 crowns, in recovering 16,000, will remain losers only of a fifth part, like the rest." (z)

Everything saved pays contribution according to its value; the shipowner contributes in proportion to the value of the ship and furniture, excepting the provisions of the crew, (a) and the passengers and owners of

(x) Abbott, 358. Pothier, (Avaries,) No. 147.

(y) *Omnium contributione sarciatur, quod pro omnibus datum est. De lege Rhodiâ.* Dig. lib. 14, tit. 2, lex 1. Pothier. *Traité des Avaries.*

Partie 2, ed. Dupin, 371. Code de Commerce, liv. 2, tit. 11. *Des Avaries.*

(z) Domat les lois civiles, lib. 2, tit. 9, s. 2. 6.

(a) Brown v. Stapleton, 4 Bing. 119.

goods shipped on board in proportion to the value of the property they save, excepting the clothes on their backs, but not excepting their wearing apparel and jewels deposited on board. (b) The freight and earnings of the ship, after deducting the wages of the master and crew, and other expenses of the voyage, likewise form the subject of contribution and general average; and if a ship be chartered out and home for one entire and indivisible sum for the use of the ship out and home, the entire freight for the outward and homeward voyage must, when ultimately earned, contribute to the loss, whether the loss has occurred upon the outward or the homeward voyage. (c)

Goods stowed upon the deck of the vessel, and thrown overboard during a storm, are not excluded from the benefit of general average and contribution, unless it be shown that the lading was improper, and calculated to impede the navigation of the vessel, and increase the risk of the voyage. (d)

To establish a claim for general average, it must be shown that the goods were *thrown* overboard in a moment of distress and danger, with a view of preserving the ship and cargo; if they have been washed out of the ship by the violence of the waves, or have been damaged or destroyed by lightning or tempest, or have been unnecessarily cast overboard by the master, or crew, or passengers, the loss will not support a claim for general average. (e) If the master or commander of the ship, to avoid being driven on rocks by a sudden squall, or to avoid capture by an enemy, runs his ship on a sand-bank or shallow, and thereby secures the safety of the ship and cargo, the damage thus voluntarily done to the ship, and the expense of getting her afloat again, and recovering her, form the subject of contribution and general average; but if the stranding be involuntary, the losses and expenses incurred will fall upon the ship alone. (f)

If the masts and cables of the vessel have been cut away for the purpose of preventing shipwreck, the owners of the cargo must contribute towards the loss of the shipowner, (g) but if they are blown away, or

(b) Pothier, *Avaries*, art. 3. By the civil law, wearing apparel was made to contribute towards the general average. "Itidem agitatum est an etiam vestimentorum cujusque et annulorum scissionem fieri oporteat et omnium visum est. Dig. lib. 14, tit. 2, lex 2, § 2.

(c) *Williams v. Lond. Ass. Co.* 1 M. & S. 325.

(d) *Milward v. Hibbert*, 3 Ad. & E. 8. s. 120, 137. *Gould v. Oliver*, 2 Sc. N. R. 241.

(e) Abbott, 427. *Mouse's case*, 12 Co. 63. *Dobson v. Wilson*, 3 Campb. 486. Pothier, Part 2, s. 2, art. 1.

(f) Abbott, 433, 434.

(g) *Birtley v. Praegerave*, 1 East, 220. So by the civil law, "Cum arbor aut aliud navis instrumentum removendi communis periculi causa dejectum est contributio debetur. Dig. lib. 14, tit. 2, lex 3, lex 5.

injured in consequence of the necessity of carrying a great and unusual press of canvass to escape a threatened danger, the loss is not the subject of contribution and general average, but is a common sea risk, which must be borne by the ship. (h) "All ordinary losses and damage sustained by the ship happening immediately from the storm or the perils of the sea, must be borne by the shipowners. But all those articles which were made use of by the master and crew upon the particular emergency, and out of the usual course, for the benefit of the whole concern; and the other expenses incurred must be paid proportionably as general average." (i)

The same rules and principles prevail in the French and other maritime codes. "If," observes Pothier, "the ship is damaged by a storm, and loses any of her masts, yards, or tackle, the expense of refitting the ship, and repairing what was lost, will fall upon the master of the vessel, for he is bound to keep the ship in good carrying condition, in the same way that workmen are bound to keep their tools in good working order But if, to prevent shipwreck, the masts and yards are cut down and thrown overboard, the loss will be common, for it is not the immediate effect of the storm, but of the fear of the common danger, therefore the loss ought to be common." (k)

If a ship accidentally runs foul of another ship in fogs or storms, or receives an injury from peril of the sea, and is obliged to put into port for repairs, the expense of re-landing and warehousing the cargo, and of the repairs, so far as they are absolutely necessary to enable the ship to prosecute the voyage, form the subject of general average. (l) "If the return to port," observes Lord Ellenborough, "was necessary for the general safety, the expenses unavoidably incurred by such necessity may be considered as the subject of general average. It is not so much a question whether the first cause of the damage was owing to this or that accident, to the violence of the elements, or the collision of another ship, as whether the effect produced was such as to incapacitate the ship from further prosecuting the voyage. As far as removing the incapacity is concerned, all are equally benefited by it, and therefore it seems reasonable that all should contribute towards the expenses of it; but if any benefit, ultra the mere removal of this incapacity, should have accrued to the ship by the repairs done, inasmuch as that will redound to the particular benefit of the ship-owner only, it will not come under the head of general average.

(h) *Covington v. Roberts*, 5 B. & P. 379.
Power v. Whitmore, 4 M. & S. 149.

(i) *Kenyon, C. J.*, 1 *Kent*, 227, 228.

(k) *Domat*, liv. 2, tit. 19, s. 2. 11.

(l) *Plummer v. Wildman*, 3 M. & S. 482.

If it is necessary to lighten the ship to enable her to get into port or to pass the bar of a river, and a portion of the cargo is taken out for the purpose and put into lighters, and the lighters perish ere they reach the shore, the loss will be common, and the owners of the residue of the cargo must contribute thereto, as it was for the general benefit that the discharge was made. But if the ship is cast away and the lighter gets safe to port, there is then no contribution, but each must bear his own loss. (m) So if a vessel being threatened with capture by an enemy's ship endeavours to save her cargo, and unloads and sends away part of it, and the remainder falls into the hands of the enemy, there shall be no contribution, as the loss of the latter had in nowise contributed to the safety of the former. (n) If a ship that has been saved from one danger of shipwreck by throwing some of the goods overboard is afterwards sunk in another place, and a portion of the cargo is recovered from the wreck, the owners of the cargo so recovered must contribute to make up the loss of those whose goods were thrown overboard for the purpose of avoiding the first peril, as the goods recovered might then have perished, but for the sacrifice of the things thrown overboard to escape it. But if he, whose goods were thrown overboard at first, happens afterwards to recover them, he shall not contribute towards the subsequent loss, as that loss has in nowise contributed to the safety of the goods so recovered. (o)

If by reason of a jettison of goods some portions of the residue of the cargo have been exposed and injured, this injury must, by the civil law, be made good by contribution. The owner of the damaged goods himself contributes towards the total loss according to the actual value of such goods after the injury, and is then entitled to contribution in respect of his own partial loss. (p) If the things that have been thrown overboard, or a part of them, chance to be recovered, the contribution ceases in proportion to such recovery; and if the contribution has been already paid, those who have received it must refund it. (q)

It has been held that the expenditure of ammunition in resisting

(m) *Navis onustæ levandæ causâ quia intrare flumen vel portum non potuerat cum onere, si quedam merces in scapham tractatæ sunt ne aut extra flumen periclitetur, aut in ipso ostio vel portu: eaque scapha summersa est: ratio haberi debet inter eos qui in nave merces salvas habent cum his qui in scaphâ perdiderunt perinde tanquam si jactura facta esset. Contra si scapha cum parte mercium salva est, navis periit. Dig. lib. 14, tit. 2, lex 4; Domat, liv. 2, tit. 9, s. 2, 14; Pothier, (AVARIES,) No. 145.*

(n) *Sheppard v. Wright*, Show, P. C. 18, 20. *Hicks v. Palington*, Moore, 297.

(o) Dig. lib. 14, tit. 2, lex 4, § 1; Pothier, art. 5.

(p) Dig. lib. 14, tit. 2, lex 4, § 2. *Pothier des Avaries*, art. 4.

(q) Si res quæ jactæ sunt apparuerint exoneratur callatio. Quod si jam contributio facta sit, tunc qui solverint agent, &c. Dig. lib. 14, tit. 2, lex 4, § 7.

capture by a privateer, the damage done to the ship in the combat, and the expense of curing the wounded, are not the subject of contribution and general average. (r) The correctness of this decision may, however, well be doubted, opposed as it is to the opinions of some of the most eminent writers on maritime law, and to the acknowledged principle of contribution. (s)

Calculation of the value.—By the civil law, the goods cast overboard were valued only at their invoice price or prime cost. (t) "A practice formerly prevailed in this country to adopt this valuation if the loss happened before half the voyage was performed; but if it happened afterwards, then to value the goods at the clear price which they would have fetched at the place of destination. The last valuation is now adopted in all cases where the average is adjusted after the ship's arrival at the place of destination. . . . But if the ship is compelled to return to its port of lading, and the average be immediately adjusted, the goods only contribute according to the invoice price." (u) As soon as the average has been calculated and the exact amount of contribution ascertained, an action may be brought for its recovery. (x)

SALVAGE.—We have already seen that the finder of lost property, who has been at labour and expense in recovering and restoring it to the owner, may, in certain cases, maintain an action against the latter to recover a reasonable compensation for the services and benefit rendered. This compensation, in the case of property lost by shipwreck and recovered and restored to the owner, is called salvage, a term derived from the French word *salver* or *sauver*, to save. In order to encourage persons to lend their aid and assistance for the protection and preservation of property from shipwreck, the law gives to the salvors by whose labour and assistance the property has been saved from impending peril a right to retain the goods until they have received a fair and reasonable compensation for their services. (y)

The amount of salvage payable in the case of the recovery of property lost by shipwreck or abandoned at sea depends upon the value of the thing saved, the degree of danger and loss, and the amount of labour and skill employed in saving it. Some maritime codes have proportioned the amount to the value of the thing saved, without reference to the surround-

(r) *Taylor v. Curtis*, 6 Taunt. 608.
(s) *Lens and Copley*, Serjt's. arg. ib. 638—643. *Phillips on Insurance*, 337. *Benecke*, 280.
Pothier, (Avaries,) s. 2, No. 144.
(t) *Dig. lib. 14, tit. 2, lex 2, § 4.*
(u) *Abbott*, 448.

(x) *Birkley v. Presgrave*, 1 East, 220. *Dobson v. Wilson*, 3 Campb. 480.
(y) *Hartfoot v. Jones*, 1 Raym. 398; *Salk.* 654, pl. 2, s. c. *Sutton v. Buck*, 2 Taunt. 302; *Byre, C. J.*, 2 H. Bl. 257.

ing circumstances of the case ; but this is obviously unjust, and our own law, therefore, merely directs as a general principle that a fair and reasonable compensation shall be made. " Looking to the current of decisions," observes Lord Tentarden, " it will be found that it is rarely less than one-third or more than one-half of the property saved, unless the services have been very inconsiderable, or the amount of the property has been very great. And in cases of derelict, although the rule is now deemed a flexible one, yet courts of Admiralty still adhere to a moiety as the favourite amount, and require some peculiar circumstances to displace it." (2)

" Salvage," observes Sir John Nickoll, " is not a mere compensation for work and labour ; various circumstances upon public considerations, the interests of commerce, the benefit and security of navigation, the lives of seamen render it proper to estimate a salvage reward upon a more enlarged and liberal scale. The ingredients of a salvage service are, *first*, enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow-creatures, and to rescue the property of their fellow-subjects ; *secondly*, the degree of danger and distress from which the property is rescued—whether it were in imminent peril and almost certainly lost if not at the time rescued and preserved ; *thirdly*, the degree of labour and skill which the salvors incur and display, and the time occupied ; *lastly*, the value. Where all these circumstances concur, a large and liberal reward ought to be given ; but where none or scarcely any take place, the compensation can hardly be denominated a salvage compensation ; it is little more than a mere remuneration *pro opere et labore*." (a) If the salvors are guilty of misconduct, and occasion injury to the ship and cargo by rescuing the vessel from one danger only to run her into another, the claim for salvage will be dismissed. (b)

A man cannot entitle himself to salvage in respect of services which have been rendered contrary to the express wishes and directions of the owner, and has no right to interfere with persons employed by the owner to save the property. (c) And if one set of men have taken possession of a vessel abandoned at sea and are endeavouring to preserve it, another set have no right to molest them and become participators in the salvage, unless it appears that the first would not have been able to effect the

(2) Abbott on Shipping, by Shee, 494, (n.)

(a) *The Clifton*, 3 Hag. Ad. R. 117 ; ib. 90, 203.

(b) *The Duke of Manchester*, 10 Jur. 863. *The Dosselet*, ib. 865.

(c) *Sutton v. Buck*, 2 Taunt. 312.

purpose without the aid of the others. (d) A passenger is not entitled to claim salvage in respect of that ordinary assistance to a vessel in distress which it is the interest of all persons on board to give, for the purpose of avoiding the common danger. (e) But for extraordinary services rendered and dangers incurred for the preservation of the vessel, the passenger is as much entitled to salvage as a mere stranger. (f)

SECTION II.

GENERAL DUTIES, OBLIGATIONS, AND LIABILITIES OF CARRIERS FOR HIRE, NOT BEING COMMON CARRIERS.

Contracts for the letting and hiring of the work of carrying.—Every person who accepts goods and chattels for conveyance to a particular destination for hire or reward, paid or agreed to be paid him for the carriage of them, impliedly lets out his labour and care in return for the hire or reward agreed to be paid to him. The contract, therefore, belongs to the class LOCATIO OPERIS. It was styled by the Roman jurists LOCATIO OPERIS MERCIUM VEHDARUM, or the letting out of the work carrying merchandize. The owner who delivered the goods to the carrier to be carried was the letter of the work of carrying, and he was also at the same time the hirer of the labour and services of the carrier, whilst the carrier, on the other hand, was both the hirer of the work of carrying and the letter of his own labour and services, care and attention, to be employed in and about the conveyance and transport of the merchandize. In our own law, the liabilities resulting from the delivery of goods to a carrier to be carried for hire form an important branch of the law of bailments

CARRIAGE OF MERCHANDIZE ON THE HIGH SEAS.

Liabilities of shipowners and masters of ships as carriers and bailees

(d) Abbott, 495.

(e) *The Branston*, 2 Hag. 3.

(f) *Newman v. Walters*, 3 B. & P. 612.

for hire.—When a charter party of affreightment operates as a demise or bailment of the ship to the charterer, and the vessel is employed by the latter as a general ship for the conveyance of merchandize, the charterer becomes the carrier of the goods shipped on board, and the master is his servant and agent whilst procuring freight and contracting with third parties for the carriage of merchandize, and not the agent of the registered owners of the vessel, and the latter, consequently, cannot be made responsible for the loss of, or injury to the goods shipped on board under such contracts. (a) But when the charter party operates merely as a contract between the charterer and the shipowner for the conveyance by the latter of goods and merchandize to be shipped on board by the charterer, the registered owners are then the carriers of the goods, and will be responsible to the charterer for the non-conveyance of them, according to their contract. Although the shipowners cannot, as we have already seen, be sued upon a charter party under seal, entered into by the master in his own name on their behalf, yet they may be made responsible for a breach of those duties and obligations which attach to them in their character of carriers, independently of the charter party. Thus, where the plaintiff declared that he had shipped a cargo of oranges on board a vessel, of which the defendants were the owners, to be carried from St. Michael's to London for certain reasonable reward, to be paid by the plaintiff to the defendants, and that it thereupon became the duty of the defendants, as such owners, to appoint a skilful master or captain for the purpose of conveying the oranges with safety, but that the defendants neglected to appoint such captain, and, on the contrary thereof, employed an unskilful and improper master or captain, through whose misconduct, carelessness, and negligence the oranges were lost and destroyed, it was held that the shipowners were responsible for the loss occasioned, although the goods had been shipped on board by virtue of a charter party of affreightment under seal executed by the master, by which the latter had covenanted to convey the cargo to its destination. "We are of opinion," observes Dallas, C. J., "that this action is properly brought. The owners of a ship, for whose benefit she was navigated, are bound by the maritime law to the owners of goods shipped and received on board, to be carried for the due carriage thereof, and are liable for any negligence on the part of themselves or their servants, whereby the goods may be damaged. If without fraud and in the due course of the ship's employment, the master makes a charter party (under seal) the shipowners are not thereby di-

(a) *Rodgers v. Forrester*, 2 Camp. 483. *James v. Jones*, 3 Esp. 27. *Mayor v. White*, 7 C. & P. 41.

vested of liability, but are still liable for the performance of such duties belonging to them in that character as are not inconsistent with the stipulations contained in the charter party; and whether that instrument be made under the seal of the master or not, seems to make no difference in this respect; because the shipowners are not charged directly upon the contract of charter party; but upon their general liability as principals in the adventure, deriving profit from the ship's employment." (b)

When the contract of affreightment is not under seal, the action for the breach of such contract and of the implied promises and engagements resulting from the acceptance of goods to be carried for hire, may be brought either against the owners who appoint the master to the command of the vessel, and constitute him their agent for the employment of the ship or against the master who has accepted the goods to be carried, whether the contract is expressed to be made, or whether the goods have been accepted by him, in his own name only, or for and on behalf of his principals and employers. (c) An agent is not ordinarily liable, as we have before seen, upon simple contracts entered into by him in a representative character on behalf of his principal; (d) but the master of a ship is considered to be something more than a mere agent, (ante, 420,) and is made responsible accordingly.

Damage to goods by the way.—The undertaker of the work of carrying goods for hire is responsible, in common with all workmen to whom goods and chattels have been bailed as accessorial to their work and the earning of their hire, for all injuries that may result to the subject matter of the bailment from the negligent and unskilful execution of the work. He impliedly undertakes to provide a seaworthy ship or vessel suitably equipped and manned for the voyage, (e) and is, by the very nature of his contract, bound, not only to carry, but to carry safely; i. e. he impliedly undertakes that the work of carrying shall be so conducted by him and his servants that the goods shall not be injured by him or them in the performance of the work, and when goods have been damaged during the execution of the work of carrying, the law presumes against the undertaker of the work, and attributes the damage to his neglect and want

(b) *Leslie v. Wilson*, 6 Moore, 429; 3 B. & B. 171, s. c. *Fletcher v. Braddick*, 5 B. & P. 186. *Fenton v. Dublin Steam Packet Company*, 8 Ad. & E. 843; 1 P. & D. 103, s. c.

(c) Ante, 402—404. *Gosling v. Higgins*, 1 Campb. 451; Cas. temp. Hardwick, 195. *Ellis v. Turner*, 8 T. B. 533. *Smith v. Shepherd*, Abbott, 338. *Boson v. Sandford*, 1

Show. 104; 3 Mod. 322; 3 Lev. 258.

(d) Ante, 416—420. *Morse v. Slue*, 1 Vent. 190, 238. *Cavanagh v. Such*, 1 Pr. 337. *Williams v. Cranston*, 2 Stark. 82.

(e) *Contrahentes cum magistro habent electionem agendi vel contra magistrum vel contra dominum navis in solidum.* *Roccus de Nav.*, n. 27.

of skill, unless he can show that he had exercised due care and taken every reasonable precaution to guard against the injury. (f)

The very occurrence of the damage to the goods is often cogent evidence of want of care. Thus, where a puncheon of rum was staved by the servants of the defendant whilst it was being lowered into the hold of a vessel, and the contents were scattered and lost, the very occurrence of the disaster was considered to be an irresistible proof of want of care and skill in the execution of the work. (g)

Loss of goods by the way.—The undertaker of the work of carrying is also bound in common with all bailees for hire to exercise the same care and caution for the safe keeping and preservation of the goods, whilst they remain in his possession, that a prudent and cautious man ordinarily takes of his own property. Whenever goods have been bailed by one man to another upon the faith of an express or implied undertaking by the latter to carry them to a distant part, it is no answer to an action brought against him to recover damages for the breach of his engagement, to say that the goods were lost by the way; the very fact of the loss affording *prima facie* evidence of neglect and want of care. (h)

Loss by robbery, fire, or accident.—If the goods have been stolen, or consumed by fire, or destroyed by accident, without fault or neglect or want of care and caution on the part of the undertaker of the work, the latter stands excused, and may avail himself of the robbery or the unavoidable accident as an answer to an action brought against him for the non-delivery of the goods to the consignee. "He is only," observes Lord Coke, "to do the best he can; and if he be robbed, &c., it is a good account, for it would be unreasonable to charge him with a trust further than the nature of the thing puts it into his power to perform it." (i) A loss by theft or secret purloining of goods, (ante, 774,) is *prima facie* evidence of negligent keeping, and the carrier must rebut this presumption by showing that he had taken all such precautions as appeared to be necessary to guard against it.

In an action against the commander of a ship of war for the loss of a quantity of bullion, "the plaintiff declared that in consideration that he had caused to be delivered to the defendant certain casks of dollars, to be carried on a voyage from the river Plate to London upon freight for certain hire and reward, the defendant undertook to take care of them, and

(f) *Morse v. Buckhurst*, 2 Vern. 441.

(g) *Goff v. Clinkard*, cited 1 Wils. 283.
Coggs v. Bernard, Raym. 912; 1 Smith's cas.

98.

(h) *Parry v. Roberts*, 3 Ad. & E. 120, 121.
 (i) *Holt, C. J., Raym.* 909. Smith 93.

assigned for breach that he took so little care of them that they were lost, and it appeared at the trial that on the arrival of the ship in the Thames, two of the casks had been opened and plundered by the crew; it was considered that the very occurrence of the loss was *prima facie* evidence of negligent keeping on the part of the defendant, and it was held that he was responsible for the loss. (*k*)

Loss by the act of God, the perils of the sea, and the dangers of navigation.—Carriers by water have from a very early period been in the habit of making special acceptances of goods to be carried for hire, and guarding themselves by the bill of lading or contract of affreightment from losses and injuries occasioned by the act of God, of the king's enemies, fire, and all the perils, dangers, and accidents of the seas, rivers, and navigation. From losses occasioned by the act of God, by the king's enemies, and the dangers and perils of the sea, and of navigation, the carrier by water is and always has been exempt by the common law, but he is not exempt, nor does the exception in the bill of lading or other contract of affreightment exempt him from accidents occasioned by his own negligence and misconduct or want of skill, or the negligence, misconduct, or want of skill of the persons whom he has intrusted with the navigation of the vessel. (*l*) The expression "act of God" denotes natural accidents, such as lightning, earthquake, and tempest, and not accidents arising from the negligence of man. And the term "perils of the sea," denotes the dangers and accidents peculiar to that element which no human care or skill can guard against or surmount, such as accidents resulting from the irresistible violence of the winds and waves and tides and currents; (*m*) the destruction of a perishable cargo, or of living animals from the rolling of a ship in a storm; (*n*) jettison of goods from irresistible necessity to lighten the ship and save her from foundering; (*o*) the grounding of a vessel on the hard and uneven bottom of a dry harbour, in which she had been obliged to take refuge; (*p*) or on a sunken rock or sand bank not generally known, and not marked on the ordinary charts or maps; irresistible attacks by pirates; (*q*) accidental collisions in fogs or storms, where no blame is imputable to either of the vessels striking together, (*r*) and not losses which, though caused immediately by the violence of the winds and waves, or the rising of the tide, are imputable to the ignorance or supineness, or

(*k*) *Hodgson v. Fullarton*, 4 Taunt. 787.
Hatchwell v. Cooke, 6 Taunt. 577.
 (*l*) Mansfield, C. J., 1 Doug. 278. *Sjordet v. Hall*, 1 M. & P. 561.
 (*m*) *Hodgson v. Malcolm*, 5 B. & P. 336.
Hagedorn v. Whitmore, 1 Stark. 157.
 (*n*) *Lawrence v. Aberdeen*, 5 B. & Ald. 110.

Gabay v. Lloyd, 3 B. & C. 793.
 (*o*) *Bird v. Ascock*, 2 Bulst. 280.
 (*p*) *Fletcher v. Inglis*, 2 B. & Ald. 315.
 (*q*) *Buller v. Fisher*, 3 Esp. 67.
 (*r*) *Pickering v. Barkley*, Styles, 132. 2 Roll. Abr. 248. *Barton v. Wolliford*, Comb. 56. So by the civil law. Dig. lib. 4, 9, 3.

the negligence or want of skill of the master or commander and mariners,^(s) whatever may be the effect given to the term "perils of the sea" as between the underwriter and insurer in certain policies of insurance.^(t)

The general rule in cases of insurance is, that the immediate and not the remote cause of loss is to be considered, but this rule does not apply as between the owner and carrier of goods. Thus, if a vessel deviates from its proper course, and sails unnecessarily through dangerous straits and channels, or into seas infested with pirates, and is wrecked or plundered in consequence of such deviation, the loss, though proximately caused by what is usually termed "a peril of the sea," is deemed to have been occasioned by the misconduct of the master or commander who had improperly gone out of his way to meet the danger. So if the vessel at the time of the commencement of the voyage is unseaworthy; if the hull is worm-eaten or gnawed by rats, or the timbers are rotten, and the vessel is shaken to pieces and founders in a gale which a stout and seaworthy ship would have withstood in safety, the loss, though proximately caused by the violence of the winds and waves, has not, in contemplation of law, been occasioned by peril of the seas, but by the negligence and misconduct of the owner of the ship, who is responsible to the owner of the cargo for the loss of the goods shipped on board.

When on the other hand from the rolling and labouring of a ship in a storm a number of horses, though properly stowed and secured on board at the commencement of the tempest, broke loose and kicked each other to death in the hold of the vessel, the loss, though proximately caused by their own hoofs, was deemed to have been occasioned by peril of the sea.

"If a ship perish in consequence of striking against a rock or shallow, the circumstances under which that event has taken place must be ascertained, in order to decide whether it happened by a peril of the sea, or by the fault of the owner, carrier, or master. If the situation of a rock or shallow is generally known, and the ship is not forced upon it by adverse winds, or storms and tempests, the loss is to be imputed to the fault of the master. And it matters not in such a case, whether the loss arises from his own rashness in not taking a pilot, or from his own ignorance or unskilfulness. On the other hand, if the ship is forced upon such a rock or shallow by adverse winds or tempests, or if the shallow is occasioned by a recent and sudden collection of sand in a place where ships could before sail with safety; or if the rock or shallow is not generally known; in all

^(s) *Rohl v. Parr*, 1 Esp. 445. *Hunter v. Potts*, 4 Campb. 203. *Muddle v. Stride*, 9 C. & P. 382. *Thompson v. Whitmore*, 3 Taunt. 228.

^(t) *Smith v. Scott*, 4 Taunt. 126. *Hahn v. Corbett*, 2 Bing. 211.

these cases the loss is to be attributed to the act of God, and it is deemed a peril of the sea." (u)

In the case of the carriage of goods by water, it is often a question of some nicety to determine whether the loss has been occasioned by the act of God or the act of man. If the carrier by water overloads his boat or vessel, and by so doing causes it to founder in a gale of wind, and the goods on board are lost, the loss is occasioned by the negligence of man, and not by the act of God; but it is otherwise if the boat has not been surcharged, but sinks solely through the violence of the winds and waves. (x) If a hoyman or barge owner shoots a bridge in tempestuous weather or at a dangerous period of the tide, and the barge is sunk and the goods lost, the loss is occasioned by the negligence and misconduct of the hoyman who has imprudently sought out the danger; but if the latter has shot the bridge at a proper time and in proper weather, but the hoy has been taken aback by a sudden gust of wind, and has been driven against the abutments of the bridge and sunk, and the goods on board lost, the loss is deemed to have been occasioned by the act of God, and the carrier, consequently, is exempt from responsibility in respect thereof. (y)

In order to determine whether the loss has or has not been occasioned by the negligence or want of care and skill of the servants of the ship-owner intrusted with the navigation of the vessel, "the established rules of nautical practice as explained by professional men, the usages and regulations of particular ports and rivers, the state of the wind, the tide, and the light, the degree of vigilance of the master and crew, and all other circumstances bearing upon the conduct and management of the vessel must be considered. (z) The rule of the sea in navigating vessels whilst passing each other is, that the ship which has the wind at large may go either to leeward or windward, but that as a general rule she ought to expect that the ship which is close hauled will keep to windward, and therefore she ought to go to leeward, unless it is quite clear that she can go to windward with safety." (a) "But although there may be a rule of the sea, yet a man who has the management of one ship is not to be allowed to follow that rule to the injury of the vessel of another, when he could avoid the injury by pursuing a different course." (b)

Loss by FIRE.—The master and owners generally take care, as we have before seen, to protect themselves by the bill of lading or contract of

(u) Abbott on shipping by Shee, 341. Story's Bailments, 333, s. 516.

(x) 22 Assiz. 41. *Williams v. Lloyd*, Jones's Bail. 180. *Muddle v. Stride*, 9 C. & P. 380.

(y) *Amies v. Stevens*, 1 Str. 128. *Symons v.*

Darknoll, Palm. 523.

(z) Abbot ut sup. 207.

(a) *Vennall v. Garner*, 1 Cr. & M. 22.

(b) *Hest*, C. J., 3 C. & P. 530.

affreightment from losses by fire. If they neglect so to do, they are liable by the common law for losses and injury occasioned by fire, proceeding from the act of man, and not from lightning or the act of God. The legislature has, however, thought fit by statute to exempt the owner from this serious liability and responsibility where he is not himself personally in fault. The common law liability of the master remains unaffected by the statute law.

Delivery of the goods.—There is an implied engagement on the part of every undertaker of the work of carrying, to proceed by the usual and ordinary course to the port of destination or place of delivery, without delay, and without unnecessary deviation. (c) If it is customary for the carrier by water to carry merely from port to port, or from wharf to wharf, and for the owner or consignee to fetch the goods from the vessel itself, or from the wharf, as soon as the arrival of the ship has been reported, the carrier must give such owner or consignee notice of the arrival of the goods on board, or at the customary place of destination, in order to discharge himself from further liability as a carrier. He cannot at once discharge himself from all responsibility by immediately landing the goods without any notice to the consignee, but is bound to keep the goods on board or on the wharf, at his own risk, for a reasonable time, to enable the consignee or his assigns to come and fetch them. (d)

When the vessel is not able to discharge at a wharf, but the goods are placed in lighters to be conveyed from the ship to the shore, and are lost on their passage through the neglect or want of skill of the lighterman, the loss will fall on the owner of the goods, if the lighterman is paid and employed by the latter; (e) but if he is employed and paid by the ship owner, or carrier, he is then the servant of the latter, expediting the goods in the further prosecution of the voyage to their place of destination, and the carrier consequently must make good the loss. Generally speaking the task of discharging the cargo is accomplished through the medium of public lightermen whose lighters are entered at Waterman's hall, and who are public officers employed and paid by the merchants and owners of the goods. These lightermen are responsible in their character of common carriers, to the merchant who employs them, and the ship owner is discharged as soon as the goods have been safely loaded on board such light-

(c) *Davis v. Garrett*, 4 M. & P. 550. 6 Bing. 716. *Woolley v. Reddelien*, 6 Sc. N. R. 206. *Chipsam v. Vertue*, 13 Law, J., N. S. (Q. B.) 4. 5 Ad. & A. N. S. 285, s. c.

(d) *Quiggin v. Duff*, 1 M. & W. 174. *Bourne*

v. Gatliffe, 3 Sc. N. R. 44; 8 ib. 604; 11 Cl. & Fin. 45, s. c. *Wardell v. Mourillyan*, 2 Esp. 693.

(e) *Sparrow v. Caruthers*, 2 Str. 1236. *Harry v. Royal Exchange Assurance Co.* 2 B. & P. 430. *Strong v. Natally*, 4 B. & P. 16-19.

ers. But he is not, by the custom of the river Thames, exonerated from liability until the loading is complete, and he is not discharged from his obligation to guard the portion of the cargo that has been placed in the lighter, by telling the lighterman that he has not sufficient hands on board to take care of it. He is on the other hand bound to take care of the lighter and its contents until it is fully laden, and is ready to leave the side of the ship. (*f*)

LIMITATION of the RESPONSIBILITY of OWNERS and PART OWNERS of SHIPS by STATUTE.

The responsibility of the shipowner is, by the common law, co-extensive with the loss, but the legislature has thought fit to narrow it by statute, and limit it to the value of the ship and freight (*g*) in all cases where the navigation of a ship is intrusted to a third party, and the shipowner is not personally in fault, and has not in any way been a party, or privy to the loss; but this limitation does not extend to "the owner of any lighter, barge, boat or vessel used solely in rivers, or inland navigation, or any ship or vessel not duly registered according to law." (*h*)

The words of the first section of the act of 53 Geo. 3, c. 159, limiting the responsibility of the shipowners are, "that no person or persons who is, are, or shall be owner or owners, or part owner or owners of any ship or vessel shall be subject or liable to answer for, or make good, any loss or damage arising or taking place by reason of any act, neglect, matter or thing done, omitted or occasioned without the fault or privity of such owner or owners, which may happen to any goods, wares, or merchandize, or other things laden or put on board the same ship or vessel, or which may happen to any other ship or vessel, or to any goods, wares, merchandize or other things being in or on board of any other ship or vessel further than the value of his or their ship or vessel, and the freight due or to grow due for and during the voyage which may be in prosecution or contracted for at the time of the happening of such loss or damage." The act, it will be seen, embraces two descriptions of losses, the one a loss or damage to the cargo laden on board the ship occasioned by the negligence of the master or mariners, and rendering the ship-owner liable *ex contractu* at common law, to the extent of the value of such cargo;

(*f*) *Catley v. Wintringham*, 1 Peake, 202. *Robinson v. Turpin*, ib. 203. n. (*a*). *Rucker v. Lond. Ass. Co.*, 2 B. & P. 432. n. (*a*)

(*g*) A similar provision had been previously adopted by most of the commercial states on the

continent.

(*h*) 7 Geo. 2. c. 15; 26 Geo. 3. c. 86, s. 1.; 53 Geo. 3. c. 159, s. 1. *Sutton v. Mitchell*, 1 T. R. 18. 53 Geo. 3. c. 159, s. 5.

and the other a loss or damage to the ship or cargo of some third party, occasioned by the negligence, or misconduct of the master, in respect of which the owner is liable *ex delicto*, but not upon any contract. To an action *ex delicto* in respect of an injury to the property of a third party, both the ship-owner and the master are liable—the owner, as the employer, responsible for the wrongful act done by the servant in the course of his employment, and the other as the party actually committing the injury, and it is to this liability *ex delicto* to which the statute refers when it provides that nothing therein contained shall lessen or take away any responsibility to which any master or mariner might then by law be liable, notwithstanding such master or mariner might be an owner or part owner of his ship or vessel.

The construction put upon the statute as regards the liability of part owners of vessels is, "that if the master be a part owner, his responsibility, if you sue him (*ex delicto*) in his character of master and not as one of several part owners, will not be limited by the first section of the act, but that if you sue him as one of the part owners with the other part owners, the circumstance of the loss being occasioned by his fault and, with his privity, will not take away from the other part owners the protection which the first section of the statute intended to give them." (i)

It has been held that the value of the ship is to be calculated at the time of the loss, and not at the time of the commencement of the voyage, and that in calculating the value of the freight due or to grow due, money paid in advance is to be included; (k) also, that whatever is on board a ship for the accomplishment of the object of the voyage and adventure on which she is engaged, belonging to the owner or part owners of the vessel constitutes a part of the ship and her appurtenances within the meaning of the act. (l)

The legislature has, moreover, released the shipowner from all liability in cases of loss by fire, and has provided that neither the master of the vessel nor the shipowner shall be responsible for any loss of, or damage to, gold, silver, diamonds, watches, jewels, or precious stones, which may be shipped on board such vessel, unless the owner or shipper shall, at the time of shipping the same, insert in the bill of lading, or otherwise declare in writing to the master or owner, the true nature, quality, and value of such gold, silver, diamonds, watches, jewels, or precious stones. (m)

(i) *Bayley, J.*, 2 B. & Ald. 13.

(k) *Wilson v. Dickson*, 2 B. & Ald. 2.

(l) *Gale v. Laurie*, 5 B. & C. 156.

(m) 26 Geo. 3. c. 86. s. 3.

The 6th Geo. 4, c. 125, s. 55, further exempts the ship-owner and master of a ship from liability in respect of losses or damages occasioned by the neglect or incapacity of a licensed pilot in charge of the vessel, and (s. 58) from loss or damage arising from the want of a pilot, provided all practicable means have been resorted to, to obtain a pilot.—“The ship owners are not responsible when they take a pilot by compulsion, and are released by the act of parliament; but in all other cases they are responsible for the acts of the pilot.” “It is the duty of the master to look after the pilot in the case of his palpable incompetency, intoxication, or of the loss of his faculties.” (n)

LIABILITY OF CARRIERS BY LAND, NOT BEING COMMON CARRIERS.

Carriers of passengers.—All persons who undertake the work of carrying passengers by land, impliedly warrant their vehicles, horses, harness, and equipments to be road-worthy, in good travelling order, and reasonably secure and sufficient in strength for the accomplishment of the journey. (o) As the work of driving is a work of skill, the carrier or coach proprietor impliedly undertakes, if he drives himself, that he is possessed of and will exercise competent skill and knowledge of driving. If, on the other hand, he accomplishes the work through the medium of inferior agents and servants, he impliedly undertakes to provide fit and proper persons to execute the office. “The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength, and properly made, and also with lights at night. If there be the least failure in any one of these things, the duty of the coach proprietor is not fulfilled, and they are answerable for any injury or damage that happens.” (p) If the driver overloads the carriage, or drives with immoderate speed, or with defective reins, or with reins so loose that he cannot readily command his horses; if he passes unnecessarily along unsafe parts of the road, or through narrow gateways or dangerous passages, or takes the wrong side of the road, and a collision occurs, the proprietor of the carriage will be answerable for injuries sustained by the passengers. (q) And if from the negligence or recklessness of the driver, or defects in the carriage, harness, or equip-

(n) Dr. Lushington. *The Eden*, 10 Jur. 298. *The Diana*, 1 W. Rob. 131. *The Duke of Manchester*, 10 Jur. 865.

(o) *Bremner v. Williams*, 1 C. & P. 414. *Jones v. Boyce*, 1 Stark. 494. *Sharp v. Grey*, 2 M. & Sc. 620. *Israel v. Clark*, 4 Esp. 259.

(p) *Best*, C. J., 3 Bing. 321.

(q) *Jackson v. Follett*, 2 Stark. 38. *Aston v. Heaven*, 2 Esp. 535. *Dudley v. Smith*, 1 Campb. 167. *Wordsworth v. Willan*, 1 Stark. 272. *Mayhew v. Boyce*, ib. 425. *Waland v. Elkins*, ib. 274.

ments, the passenger is placed in so perilous a situation, as to render it advisable for him to leap to the ground to avoid a greater peril reasonably to be apprehended, and sustains an injury in so doing, the coach proprietor is answerable therefor. (s) In determining the question of negligence in cases of collision, the law or custom of the road as to passing vehicles is to be taken into consideration; but it does not follow that a person who neglects that custom, and is on the wrong side of the road when a collision takes place, is necessarily guilty of negligence. "Circumstances may frequently arise, where a deviation from what is called the law of the road would not only be justifiable, but absolutely necessary." (t)

Carriers of goods.—If a man receives goods for the purpose of safely and securely carrying them, a duty is cast upon him, though he be not a common carrier, to provide a proper vehicle, and see that the goods are properly packed. (u) He is bound, moreover, to provide tarpaulins and "cartclothes, and all such coverings as are necessary to protect the goods from injury by rain;" and if he fails in this duty, or if the goods are damaged or spoiled by reason of the negligence or want of care of himself or his servants, he is responsible to the owner for the injury that has been sustained. (x)

Loss of goods by the way.—We have already seen, in the case of the carriage of merchandize on the high seas, that the loss of goods in a port or harbour, or on the voyage, affords a *prima facie* presumption of negligence and want of care, and that the undertaker of the work of carrying, in order to escape from responsibility in respect of such loss, must prove that he had taken proper care of the things entrusted to him, and must show that the loss was occasioned by a forcible robbery that he could not withstand or resist, or by fire, or by some inevitable accident; (ante, 794, 795). So in the case of the carriage of valuables or chattels by land, the person who receives the things to be carried by him for hire to a certain destination, cannot set up a mere loss of goods by the way, as an answer to an action for the nondelivery of them according to his contract. Thus where the declaration in an action of *assumpsit* alleged that the plaintiff delivered to the defendant £3, to be carried to the Black-boy, in Southwark; that the defendant, in consideration of the premises, and for that the plaintiff did undertake "reasonably to content him for the carriage," promised safely

(s) *Jones v. Boyce*, 1 Stark. 493.

(t) *Wayde v. Lady Carr*, 2 D. & R. 256.

(u) *Cresswell, J. Webb v. Page*, 6 Sc. N. R. 557; 6 M. & Gr. 204.

(x) *Ib.* 951, 204, s. c. *Robinson v. Dunmore*,

2 B. & P. 416. *Walker v. Jackson*, 10 M. & W.

163, 169. *Symons v. Darknoll*, Palm. 523.

to convey it thither, and deliver it at the said sign to the plaintiff, but that he had not done so ; it was held that the defendant, who had accepted the money to be carried, was liable upon such a promise, although he was not a common carrier, and although no sum certain had been agreed to be paid him as the price of the carriage. (y) So where a traveller hired a cab for the conveyance of himself and his luggage to the Great Western railway station at Paddington, and the luggage was placed on the outside of the cab, but on the arrival of the vehicle at the railway station, a portion of it was found to be missing, it was held that the law would imply from the acceptance of the luggage by the cabman to be carried, together with the passenger, for hire, a promise from him " safely and securely " to carry it, and that he was responsible for the portion lost by the way. (z)

The promise to carry safely, which the law implies from all persons who undertake the carriage of goods for hire, is not understood to mean that the goods shall be carried and delivered safe at all events, but that they shall be kept safe from all such hazards and contingencies as might have been foreseen and guarded against by the exercise of vigilance and skill. The contract is " a contract to carry safely and securely as far as regards the neglect of the carrier himself and his servants, but not to insure the safety of the goods," and the carrier therefore would not be liable for losses by thieves, or any taking by force ; or if the owner accompanies the goods to take care of them, and was himself guilty of negligence ; for it is a rule of law that a party cannot recover if his own negligence was as much the cause of the loss as that of the defendant." (a)

The carrier's liability continues until the goods have been duly delivered to the consignee ; (post, s. 3, *DELIVERY of goods by COMMON CARRIERS.*)

SECTION III.

LIABILITIES OF COMMON CARRIERS ; (ante 251—253.(a))

Definition of a COMMON CARRIER.—Every person who plies with a carriage by land, or a boat, or vessel by water, between different places, and

(y) *Rogers v. Head*, Cro. Jac. 262. *Matthews v. Hopping*, 1 Keb. 852.

(z) *Ross v. Hill*, 15 Law J., n. s. (C. P.) 182.

(a) *Brind v. Dale*, 8 C. & P. 209, 211 ; 2

M. & Rob. 80, s.c.

(a) As to the parties to be made plaintiffs in actions against common carriers, see ante, 251, 252, 253.

professes openly to carry passengers and goods for hire, is a common carrier. Such are railway companies, who profess to carry passengers and parcels, (b) stage coach and stage waggon proprietors, lightermen, hoymen, barge owners, canal-boatmen, and the owners and masters of ships and steam-boats employed as general ships for the transportation of all persons offering themselves or their goods to be conveyed for hire to the port of destination. (c) "When it is said that the owners and masters of ships are deemed common carriers, it is to be understood of such ships as are employed as general ships, or for the transportation of merchandize for persons in general; such as vessels employed in the coasting trade, or in foreign trade, for all persons offering goods for the port of destination. But if the owner of a ship employs it on his own account generally, or if he lets the tonnage, with a small exception, to a single person, and then for the accommodation of a particular individual, he takes goods on board for freight, (not receiving them from persons in general,) he will not be deemed a common carrier, but a mere private carrier, for he does not hold himself out as engaged in a public business or employment." (d) The owner of a cart or carriage who does not ply regularly for hire to a particular destination, but merely lets out a private carriage, with horses and driver, by the hour, day, or job, to proceed to any destination ordered by the hirer, is not a common carrier. (e) A London cab-driver or hackney-coachman, for example, is not a common carrier. (f)

Liabilities of COMMON CARRIERS.—Every person who starts a public conveyance, and professes to carry passengers or goods, or both the one and the other, from one place to another, for a reasonable or customary reward, or a fixed price, is bound to exercise his duty and employment in favour of all persons who are ready and willing to pay him his customary hire, provided he has room in his coach, cart, or carriage, for their conveyance, (g) and intends to set out on his accustomed journey. (h)

If four persons, wishing to travel together, take "the whole inside of a coach," the coach proprietor and his servants have no right to separate

(b) *Palmer v. Grand Junction Co.*, 4 M. & W. 749; and see 8 M. & W. 421; 5 Ad. & E. n.s. 747.

(c) *Gisbourne v. Hurst*, 1 Salk. 249. *Rich v. Kneeland*, Cro. Jas. 330; Bac. Abr. (CARRIERS) A. *Mors v. Slue*, 1 Mod. 85; 1 Vent. 190, 238; T. Raym. 220, s.c. *Boucher v. Lawson*, cases temp. Hardwicke, 198.

(d) *Story's Bailments*, 325, § 501.

(e) *Brind v. Dale*, 8 C. & P. 207; Mood & Rob. s.c.

(f) *Ross v. Hill*, 15 Law J., n.s. (C.P.) 182.

(g) *Best, C. J.*, 2 M. & P. 338; Bac. Abr. (CARRIERS) B. *Jackson v. Rogers*, 2 Show. 328; Holt, C. J., Skin. 279. *Pickford v. Grand Junction Railway Company*, 8 M. & W. 372.

(h) *Coggs v. Bernard*, 1 Raym. 652. *Edwards v. Sherratt*, 1 East, 610; Holroyd, J., 4 B. & Ald. 32; 1 Raym. 652; 4 Burr. 2301.

them, and do not fulfil their contract by furnishing a double-bodied coach, and tendering three inside places in one division and one in the other. (i)

"If a person takes a place in a stage-coach, and pays at the time only a deposit, as half the fare for example, and is not at the inn ready to take his place when the coach is setting off, the coach proprietor is at liberty to fill up his place with another passenger; but if at the time of taking his place he pays the whole of the fare, in such case the coach proprietor cannot dispose of his place, but the passenger may take it at any stage of the journey he thinks fit." (k)

Every common carrier of passengers for hire is bound to exercise the greatest possible care and forethought for securing the safety of his passengers. (l) He is answerable for the smallest negligence on his own part, or on the part of his servants and agents, but not for unforeseen accidents and misfortunes, which the greatest care and vigilance could not have provided against or prevented, such as accidents resulting from the horses suddenly taking fright, (m) or from the breaking of an axle-tree which was sound and perfect, and broken purely through inevitable accident. (n) He "does not warrant the absolute safety of his passengers. His undertaking as to them goes no further than this, that as far as human care and foresight can go, he will provide for their safety." (o) "When everything has been done that human prudence can suggest, an accident may happen. The lights may in a dark night be obscured by fog; the horses frightened, or the coachman may be deceived by a sudden alteration in the position of objects near the road by which he had been used to be directed in former journies; and if, having exerted proper skill and care, he from accident gets off the road, the proprietors are not answerable for what happens from his doing so." (p) But the breaking down or overturning of a coach is *prima facie* proof of negligence on the part of the driver, and he must rebut this presumption, if it be unfounded, by showing that "the damage arose from what the law considers a mere accident." (q)

Carriage of passengers by RAILWAY.—When the carriage is by railway,

(i) *Long v. Horne*, 1 C. & P. 611.

(k) *Ker v. Mountain*, 1 Esp. 26, per Lord Kenyon.

(l) As to the ordinary liabilities of carriers of passengers not being common carriers, see ante, 801, 802.

(m) *Aston v. Heaven*, 2 Esp. 535, per Eyre, C. J. *White v. Boulton*, Peake, 113. *Crofts v. Waterhouse*, 11 Moore, 137.

(n) *Christie v. Greggs*, 2 Campb. 79. If the

axle-tree breaks through a flaw in the iron, the carrier is responsible. *Sharp v. Grey*, 2 M. & Sc. 620; 9 Bing. 460, a. c.

(o) Sir James Mansfield, 2 Campb. 81. *Harris v. Costar*, 1 C. & P. 637, per Best, C. J.

(p) Best, C. J., *Crofts v. Waterhouse*, 3 Bing 321.

(q) Sir James Mansfield, 2 Campb. 79. Park, J., 2 M. & Sc. 623.

the railway company impliedly warrants the railway itself to be in good travelling order, and fit for use, and impliedly promises all persons who agree to become passengers, to provide roadworthy engines and carriages, skilful drivers and engineers, and all things necessary for the safe conveyance of such passengers. If the driver of a railway engine drives at a dangerous speed, or from negligence or unskilfulness causes the train to be thrown off the rails, or to come into collision with another train, the railway company is responsible for all damages and injuries that may have been sustained by the passengers. (r)

Common carriers of goods were, as we have already seen, (ante, 729.) made responsible by the public edict of the Roman prætor, together with common innkeepers and stable-keepers, for the safe delivery of the goods entrusted to them, unless such delivery was prevented by some inevitable accident, which no human care or skill could have provided against. The reasons for this extended responsibility are perhaps more cogent in the case of the common carrier of goods than the common innkeeper, and the common law has consequently, from an early period, adopted the spirit of the ordinances and decisions of the civil law respecting common carriers, as well as those respecting common innkeepers. "The law," observes Holt, C. J., "charges the common carrier, entrusted to carry goods, against all events but acts of God and enemies of the king. For though the force be never so great as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sort of persons that they may be safe in their dealings. For else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c.; and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point." (s) The common carrier of goods for hire has been said consequently to be an INSURER of the safe delivery of the goods entrusted to him for conveyance. "To give proper security to property, the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward, viz. that of taking all reasonable care of it, the responsibility of an insurer from which he is

(r) *Carpue v. London and Brighton Rail. Co.*, 5 Ad. & E. n. s. 747. *Palmer v. Grand Junction Railway Co.* 4 M. & W. 749. *Bridge v. Grand Junct. Rail. Co.*, 3 M. & W. 244, 248.

(s) *Coggs v. Bernard*, Raym. 909. Smith's

leadg. cas. 92, 93. Lord Mansfield, 1 T. R. 33. *Morse v. Slue*, 1 Mod. 85; 1 Vent. 190, 238. *Nicholls v. Morse*, Sid. 36. *Woodliff's case*, Moore, 462; 1 Roll. Abr. 2 c.; Vidian's entries, 87; Herne, 76; Mod. Entr. 91, 92, 145.

to be relieved only by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, viz. the act of God and the king's enemies." (t) By the term act of God is meant something in opposition to the act of man, such as storms, lightning, and tempests, and inevitable accidents not resulting from human agency. If the danger or the accident, though unavoidable, has been occasioned by the act of man, the carrier cannot avail himself of it as an excuse for the nondelivery of the goods. Thus where an action was brought against a common carrier for not safely carrying and delivering a quantity of hops, and it appeared that a fire broke out in a building adjoining a booth under which the carrier had placed the hops, and burnt with unextinguishable violence, and extended itself to the hops, and consumed them, without any neglect or default on the part of the carrier himself, it was held that inasmuch as the fire had not been occasioned by lightning, but by the act of man, the occurrence of the disaster constituted no answer to the action! (u)

If the goods have been destroyed or swept away by rains and floods, the circumstances attendant upon the loss must be regarded, in order to determine whether it has been occasioned by the act of God or the act of man. If the carrier has neglected to provide cartclothes and proper coverings for the goods; if he has gone out of his way to meet the danger; if he has travelled by unusual roads, or crossed a plain subject to inundations when he might have kept the high ground and been safe, the loss thus occasioned by the rains and floods is a loss from the act or negligence of man, and the carrier is consequently responsible therefor. "If the common carrier goes by the ways that be dangerous, or drive by night, or in other inconvenient time, or if he overcharge a horse, whereby he falleth into the water, or otherwise so that the stuff is hurt or impaired, then he shall stand charged for his misdemeanour." (x) The carrier is not of course responsible for any deterioration in the value of the goods resulting from the negligence or want of care of the owner or the consignor, such as defective packing, nor for losses occasioned by an inherent defect in the article causing its destruction. (y) If, however, the defective packing of goods is patent and visible, and easily remedied, and the carrier accepts the goods for conveyance, he is to take all reasonable means to provide against the defect, and secure their safety.

(t) Per Cur., *Riley v. Horne*, 2 M. & P. 338; 5 Bing. 217, s. c. *Forward v. Pittard*, 1 T. E. 33. *Hyde v. Trent Nav. Co.*, 5 T. E. 399.

(u) *Forward v. Pittard*, 1 T. E. 27. *Hyde*

v. Trent Nav. Co. 5 T. E. 399.

(x) Doct. & Stud. Dial. 2, ch. 38; Noy's maxims, ch. 43. *Dale v. Hall*, 1 Wils. 281.

(y) *Hawkes v. Smith*, 1 Car. & M. 72.

A dog, with a string about his neck, was delivered to a carrier to be carried, and was tied by the string in a watch-box ; shortly afterwards the dog slipped his head through the noose, and escaped, and was never afterwards heard of ; and an action having been brought against the carrier to recover the value of the dog, it was contended that the owner ought to have taken care that the cord was properly secured round the dog's neck, but it was held that as the carrier had the means of seeing that the dog was insufficiently secured, he ought to have locked him up or taken other proper means to secure him, and that he was consequently responsible for the loss. (z) So where a cask of brandy was delivered to a common carrier to be carried for hire from Shrewsbury to London, and the cask began to leak on the road, and the passengers in the waggon repeatedly informed the waggoner of the circumstance, but the latter continued his journey onwards through Birmingham and Wolverhampton, and made no attempt to stop the leakage or save the brandy at any one of the stages at which he had halted, until the greater portion of it had been lost, it was held that the carrier was responsible to the owner for the damage that had been sustained by reason of the neglect. (a)

The carrier cannot qualify or limit his liability in respect of the negligence, want of skill, or carelessness of his servants and agents in and about the carrying of the goods by any private arrangement as to remuneration out of the profits of the business or otherwise between himself and such servants or agents. " If a common carrier should allow his driver of the carriage some small things as perquisites, the master would, without all doubt, be still liable ; and that is only a private agreement between master and servant, and only a different way of paying his servant's wages." (b)

And if the accident or casualty causing the loss of the goods is occasioned by the misconduct of a third party, and not by any fault or neglect on the part of the carrier himself, the latter is nevertheless responsible to the owner for the loss, as he has himself a remedy over against the offending party. Thus where the ship of a common carrier by water drove on an anchor in the river Humber, and was sunk, and the goods on board were injured, and the accident was occasioned by the neglect of a third party, in not having his buoy out to mark the place where his anchor lay, it was held that the carrier was nevertheless bound to make good the loss. (c)

(z) *Stuart v. Crawley*, 2 Stark. 824.

(a) *Beck v. Evans*, 16 East, 244.

(b) *Page, J.*, Cas. temp. Hard. 90 ; 5 T. R.

397.

(c) *Trent Navigation Company v. Wood*, 3 Esp. 130.

But to charge the common carrier for the loss of goods, however occasioned, it must of course in all cases be clearly shown that the goods were either actually or constructively bailed to the carrier or his servants to be carried. They must either be delivered into the hands of the carrier himself, or into the hands of his servant or agent, or some person authorized by him to receive them. If they are merely deposited in the yard of an inn, or upon a wharf to which the carrier resorts, or are placed in the carrier's cart, vessel, or carriage, without the knowledge and acceptance of the carrier, his servants or agents, there has of course been no bailment or delivery of the goods to the carrier, (d) and he cannot consequently be made responsible for the loss of them.

If a person makes a private bargain with the driver of the cart or coach of the common carrier for the conveyance of a parcel for a gratuity which was not intended by the parties to find its way into the pocket of the carrier, there has been then no bailment to the latter, and he is not consequently liable in case the parcel is lost. The bailment in such a case is a bailment to the driver alone, and he alone is responsible for the loss. (e) And if a man merely hires the cart or carriage of a common carrier, and sends his own servants with the goods to take charge of them, there is no delivery or bailment to the carrier, and the latter is not responsible for their safety. (f)

If a passenger travelling on the outside of a stage-coach, keeps a parcel or package in his own hands, and under his own care, or takes his luggage with him into the interior of the vehicle, professing to watch it and take charge of it himself, and the thing is lost, the carrier is not responsible for it, as it was never delivered to him or to his servants, or in any way entrusted to his or their keeping. But if the thing has been tendered to the coach proprietor, or other carrier of passengers and goods, for conveyance, and the latter has directed the passenger to place it in or upon any portion of the vehicle, there has been a constructive bailment or delivery, and acceptance of the goods, so as to charge the carrier for the loss of them. A delivery of goods to a person sent or appointed by the carrier to receive them, is of course a delivery to the carrier himself. (g) And when goods have been delivered to the driver of a stage coach, or to any

(d) *Selway v. Holloway*, 1 Raym. 46. *Buckman v. Leir*, 3 Campb. 414. *Lovett v. Hobbs*, 3 Show. 128. *Leigh v. Smith*, 1 C. & P. 640.
(e) *Butler v. Basing*, 2 C. & P. 613. *Bignold v. Waterhouse*, 1 M. & S. 259. *Williams v. Cranston*, 2 Stark. 84.

(f) *East India Company v. Pullen*, 2 Str. 690.

(g) *Boys v. Pink*, 8 C. & P. 361; ante, 398, 399. *Syms v. Chaplin*, 5 Ad. & E. 634; 1 N. & P. 129, s.c.

other servant or agent of the carrier, the action for the loss of the goods should be brought against the coach proprietor, and not the mere servant or agent. (h) If, indeed, the latter has himself an interest in the coach, and a share in the profits of the business, then the action may, as we have before seen, be properly brought against him.

Loss of passengers' luggage by the way.—If a man professes to be a common carrier of passengers merely, and only receives occasionally, and at his own option, some trifling articles of luggage with such passengers, to be carried gratuitously for the accommodation of the latter, he cannot be charged as a common carrier of goods for the loss of them. He is, in such a case, a gratuitous bailee of the goods, and chargeable only with the liabilities and responsibilities of a person who gratuitously undertakes to carry goods for another; (post, ch. 25, s. 2.) Such is a hackney coachman, or an omnibus proprietor, who professes only to carry passengers and receives his hire solely therefor, but occasionally receives and carries gratuitously small bundles and parcels for the accommodation of his passengers. As he does not profess to carry goods for hire, he cannot be compelled to receive them as a common carrier of goods, neither can he be charged except as a gratuitous bailee for the loss of them. (i) If, however, the carrier or coach proprietor professes to carry both passengers and luggage, he is clothed with the obligations and responsibilities of a common carrier of goods for hire. (k)

When the common carrier of goods carries on the business both of a warehouseman and a common carrier, the nature and extent of his liability will depend upon the character in which he holds the goods at the time of the loss. If they are received into the warehouse of such common carrier to await the future orders of the owner or consignor as to their destination, the carrier is clothed only with the ordinary duties and responsibilities of a warehouseman. (l) But if the destination is marked out, and the carrier has nothing to do but to forward the goods on the earliest opportunity to the place indicated, he is responsible as a common carrier for any loss or damage that may occur to the goods in the warehouse, as they are then *in transitu* in contemplation of law. (m) If the consignee, having no

(h) *Williams v. Cranston*, 2 Stark. 82; *Best*, J., 5 B. & Ald. 68.

(i) *Upshars v. Aides*, 1 Com. 24.

(k) *Cairns v. Robins*, 8 M. & W. 268. *Brook v. Pickwick*, 4 Bing. 218, 222, 223; *Chambre, J.*, 2 B. & P. 419. *Lovett v. Hobbs*, 3 Show. 128. *Clarke v. Gray*, 4 Esp. 177. *Middleton v. Fowler*, 1 Salk. 282.

(l) *Cairns v. Robins*, 8 M. & W. 268. *Rorrell v. Waterhouse*, 2 Stark. 461. *Garride v. Trent Navigation Company*, 4 T. R. 582. *Isre Webb*, 8 Taunt. 449; 2 Moore, 500, s. c.

(m) *Forward v. Pittard*, 1 T. R. 27; *Baller, J.*, 5 T. R. 398. As to accidental fires in warehouses, see 6 Anne, c. 31, s. 6, made perpetual by 10 Anne, c. 14, s. 1.

warehouse of his own, asks the carrier to keep the goods until he can conveniently send for them, the carrier's liability as carrier is at an end, and he thenceforth holds the goods only as a warehouseman for hire, or a gratuitous bailee, according as he may or may not be paid for his care and custody of them. (n)

Of the delivery of the goods at the place of destination.—The common carrier of goods is bound, in common with all carriers for hire, to carry the goods entrusted to him for conveyance to their place of destination, with reasonable expedition, (o) and deliver them into the hands of the consignee, or of some person expressly or impliedly authorized by him to receive them; and he must of course in all cases take especial care that they are delivered into the hands of the right person. (p) When the carriage is by land, the goods must be sent to the residence of the consignee, for the common carrier is not released from responsibility by leaving them at the coach-office, or at an inn by the road side, at which the coach usually stops. If he tenders them at the residence of the consignee, and is ready to deliver them on receiving payment of his hire, he has fulfilled his contract as a carrier; and if the hire is not paid, he is not bound, as we have already seen, to part with the possession of the goods; but he may lawfully take them back to his warehouse, or place of business, and he holds them thenceforward not as a common carrier, but as a bailee for hire, or (if he is not entitled to charge, or does not charge, warehouse rent) as a gratuitous bailee. (q)

When the carriage is by water, the delivery at a wharf is not, as we have before seen, a delivery to the consignee, unless it is made so by the usage and practice of the port where the delivery takes place; but the master is bound to give the consignee notice of the arrival of the goods, and is not released from his responsibility for their safety, until a reasonable time has elapsed after the giving of the notice for the consignee to come and fetch them. He cannot escape from his liability as a common carrier, by immediately landing the goods at a public wharf, without giving notice to the consignee, and giving him an opportunity of receiving them from the ship's side; and if he does so land them, and they are destroyed upon the wharf by an accidental fire before the consignee has

(n) *In re Webb*, 8 Taunt. 449; 6 Moore, 500, s. c.; ante, 59, 60.

(o) *Raphael v. Pickford*, 6 Sc. N. B. 478; 2 Dowl. N. S. 916.

(p) *Golden v. Manning*, 3 Wils. 433; 2 W. Bl. 916, s. c. *Birkett v. Willan*, 2 B. & Ald.

356. *Duff v. Budd*, 6 Moore, 469. *Stephenson v. Hart*, 1 M. & P. 357; 4 Bing. 476, s. c.; and see ante, 254.

(q) *Storr v. Crowley*, M'Clel. and Y. 136; ante, 810; post, ch. 25, s. 1.

had an opportunity of taking them away, the shipowners will be responsible for the loss. (r)

When a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, that is *prima facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed, although the place may be beyond the limits within which he ordinarily professes to carry on his trade of a carrier. (s) His responsibility, therefore, continues to the door of the address to which the goods are destined, and he cannot release himself from such responsibility by transferring the goods to another carrier, or sending them by another conveyance. (t) If a railway company, for example, accepts goods for conveyance to a particular destination, beyond the limits of its own line of railroad, and the goods are lost whilst in the hands of another railway company, to whom they have been delivered to be forwarded on their journey, the first railway company is the party to be sued by the owner of the goods, as being the party contracting with him for the conveyance of them. (u)

If a cargo or load of goods weighing a certain weight be delivered to a carrier to be carried for hire, and the cargo on its arrival at its destination is deficient in weight, there is a *prima facie* presumption of negligence on the part of the carrier, which the latter must rebut by showing that the deficiency of weight arose from causes over which he had no control. (x)

Notices of action to railway companies.—When an act of parliament constituting and incorporating a railway company provides that no action shall be brought against the company for anything done or omitted to be done pursuant to the act, or in execution of the powers and authorities given by the act, unless previous notice, in writing, shall have been given by the party intending to prosecute such action, or unless such action shall have been brought within a certain limited period, the enactment does not extend to actions *ex contractu*, and does not in anywise restrain or affect the liability of the company upon contracts entered into by it in its character of a common carrier. The omission by a plaintiff consequently to give such notice does not preclude him from recovering damages against the company for its negligence or misconduct, or for

(r) *Bourne v. Gatliffe*, 3 Sc. N. R. 1; 3 M. & Gr. 643, s. c.; 8 Sc. N. R. 604; 7 M. & Gr. 860, s. c. *Syeds v. Hay*, 4 T. R. 260. *Wardell v. Mourillyan*, 2 Esp. 693.

(s) Per Rolfe, B., 8 M. & W. 433.

(t) *Garnett v. Willan*, 5 B. & Ald. 53. *Sleat v. Fagg*, ib. 342.

(u) *Muschamp v. Lancaster and Preston Rail. Co.* 8 M. & W. 421.

(x) *Hawkes v. Smith*, 1 Car. & M. 72.

a breach of those duties and obligations which result from the nature of its employment as a common carrier.(y)

Limitation of the carrier's liability by express contract.

CARRIER'S NOTICES.—The right of the common carrier of goods to charge a rate of carriage proportioned to the value of the article tendered to him for conveyance, naturally results from his character and situation of an insurer of the safety of the goods he carries. The amount of risk and responsibility incurred by him naturally depends upon the value of the article he carries, and when a carrier was required to convey a bag of gold across Hounslow heath, it was thought that he was justly entitled to charge a rate of remuneration proportioned to the increased risk he ran by so doing.(z) "His warranty and insurance," observes Lord Mansfield, "are in respect to the reward he is to receive, and the reward ought to be proportionable to the risk. If he makes a greater warranty and insurance he will take greater care, use more caution, and be at the expense of more guards and other methods of security, and therefore he ought in reason and justice to have a greater reward." "A higher price ought in conscience to be paid him for the insurance of money, jewels, and valuable things, than for insuring common goods of small value."(a)

Hence when boxes and packages were brought to carriers for conveyance, it became usual for the latter to ask the value of the contents, and to charge accordingly, and it was held that the owner was, in all cases, bound by his representation of value, and could not give evidence of the falseness of his own statement in order to throw an increased responsibility upon the carrier.(b) But the owner was not bound to declare the value of the parcel unless he was asked; if the carrier asked no questions, and there was no fraud or intentional concealment to give the case a false complexion, the carrier was responsible for the safety of the parcel whatever might be its value, (c)

To obviate the inconvenience of asking questions in each case, and the difficulty of proving the statements made on each occasion, common carriers resorted to the expedient of advertising in newspapers, and posting on the walls of their booking-offices public notices, to the effect that they

(y) *Palmer v. Grand Junc. Rail. Co.* 4 M. & W. 749; 7 Dowl. P. C. 232. *Carpue v. Lond. & Bright. Rail. Co.* 5 Ad. & E. n. s. 747.
(z) *Tyly v. Morrice*, Carth. 486.
(a) *Aston, J.*, 4 Burr. 2301, 2303. And see *Riley v. Horne*, 2 M. & P. 338.

(b) *Ib.* 485. *Turner v. Davis*, cited 1 H. Bl. 299.

(c) *Kenrig v. Egg'ston*, Aleyn, 93. *Titchburne v. White*, 1 Str. 145. *Parke, B.*, 10 M. & W. 168, 169.

would not be liable for the loss of money and valuables unless they received notice of their existence, nor for the loss of ordinary goods and chattels beyond a certain amount, unless the value of such goods was declared and entered at the office, and an increased rate of remuneration paid for their conveyance. And it was held that the carrier might by these notices release himself from his responsibility as an insurer, unless he was paid an increased remuneration to cover the risk. Thus where a carrier had given public notice that he would not be answerable for the loss of money unless it was made known to him that he had money to carry, and the consignor, although apprized of this notice, concealed 100*l.* among some hay in an old nail bag which he delivered to the carrier to be forwarded to London, and the bag and the hay arrived safe, and the money was gone, it was held that the carrier was not responsible for the loss. (d) So where the carrier's notice stated that cash and valuables "of more than 5*l.* value would not be accounted for if lost, unless entered as such, and a penny insurance paid for each pound value;" and a quantity of guineas of more than 5*l.* in value were delivered to the carrier to be conveyed from Wakefield to London, and were stolen on the journey, it was held that the carrier was not liable to any extent in respect of the loss. (e)

But although the carrier had a right to relieve himself by notice from the extended and onerous liabilities of an INSURER, unless he was paid a remuneration adequate to the risk, yet he could not by his notice discharge himself from his implied engagement to be careful and diligent in the execution of the work of carrying. The labour of care is necessarily involved in the labour of conveyance, and when a man enters into a contract for the carriage of goods, he impliedly grants or lets out his own labour and care for the accomplishment of the work of carrying in return for the hire paid or agreed to be paid him, (ante, 791,) and he cannot enter into the contract, and at the same time say that he will not be responsible for his negligence and want of care. He cannot impose such a condition upon the other contracting party, as it is a condition going to the destruction of the thing granted, when, according to the well known rule the thing granted passes freed from the condition. (f) It cannot be supposed that the parties intended to enter into a contract for the letting and hiring of labour and care, and agreed at the same time to dispense

(d) *Gibson v. Paynton*, 4 Burr. 2301.

(e) *Clay v. Willan*, 1 H. Bl. 298. *Izett v. Mountain*, 4 East, 871. *Nicholson v. Willan*, 5 East, 507, 514. *Clarke v. Hutchins*, 14 East,

475. *Bignold v. Waterhouse*, 1 M. & S. 255.

Bradley v. Waterhouse, 3 C. & P. 318.

(f) *Tindal, C. J., Lucas v. Godwin*, 4 Sc. 509. 3 Bing. N. s. 744.

with the exercise of such labour and care. "It is impossible," justly observes Lord Ellenborough, without outraging common sense, so to construe the notice as to make the carriers say, "We will receive your goods, but we will not be bound to take any care of them, and will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross and injurious." (g) "If the carrier should perchance refuse to carry the stuff unless promise were made unto him that he should not be charged for any misdemeanour that should be in him, the promise were void; for it were against reason and against good manners, and so it is in all other cases like." (h)

To give a proper effect, therefore, to the contract, and also to the notice of the carrier, it was held that the notice applied only to the responsibilities and liabilities of the carrier as an INSURER (i) of the safety of the goods, and did not and could not exempt him from the consequences of his own misconduct or negligence, or from the misconduct and negligence of his servants and persons in his employ. Thus where a bank parcel of the value of 347*l.* 11*s.* was delivered to a stage coach proprietor, who was aware of its value, to be carried for the ordinary hire from Hereford to Brecon, and the coachman who was intrusted with it got drunk on the road and lost it, it was held that the coach proprietor was responsible, although he had given the usual notice to the effect that he would not be liable for parcels above 5*l.* in value, unless insured and paid for accordingly. (k) So where a cask of brandy was delivered to a carrier to be carried for hire, and the cask began to leak on the road, and the carrier's servant made no attempt to stop the leak and save the brandy, at any of the stages at which he stopped, although he might easily have done so, and the brandy was consequently lost; it was held that the carrier was not protected from the consequences of the negligence of his servant by a notice to the effect that he would not be answerable for any goods of what nature or kind soever above the value of 5*l.* if lost, stolen, or damaged, unless a special agreement was made and an adequate premium paid over and above the common carriage; (l) and where a parcel of the value of 67*l.* 9*s.* 6*d.* was lost on the road through the negligence of the carrier in leaving his cart without anybody to watch it, and the carrier had given the usual notice that he would not be answerable for goods exceeding the value of 5*l.* unless entered and paid for according to an increased rate of charge,

(g) *Lyon v. Mells*, 5 East, 438.

(h) Doct. & Stud. Dial. 2 ch. 39. Noy's maxims, ch. 43, 92. Best, C. J., *Newborn v. Just*, 2 C. & P. 76.

(i) Best, J., 5 B. & Ald. 64. *Wyld v. Pickford*, 8 M. & W. 461.

(k) *Bodenham v. Bennett*, 4 Pr. 31.

(l) *Beck v. Evans*, 16 East, 247.

which notice was known to the plaintiff, it was held that the carrier was nevertheless responsible to the extent of the full value of the parcel, by reason of his negligence and want of ordinary care.^(m)

And if a carrier neglects to deliver a parcel at the house of the party to whom it is addressed, but delivers it to a stranger in the street who has no authority from the consignee to receive it, and the parcel is lost, the carrier is responsible for his negligence, and cannot by the common law protect himself from the consequences of his misconduct by the ordinary carrier's notice.⁽ⁿ⁾ "Every man who undertakes for reward to do any service, obliges himself to use due diligence in the performance of such service. Independently of his responsibility as an insurer, a carrier is liable for gross negligence, and the jury are to decide what is gross negligence. The notice will protect him unless the jury think that no prudent person, having the care of an important concern of his own, would have conducted himself with so much inattention or want of prudence as the carrier has been guilty of."^(o)

If the conduct of the bailor or consignor himself has in any way conduced to the loss, he has no ground for seeking compensation at the hands of the carrier. (Ante, 773.) If a man, for example, sends a parcel of bank notes, or a box of sovereigns, or valuables, to a carrier to be carried as a parcel of ordinary value, requiring no more than ordinary care, and the thing is stolen, the carrier is not responsible for the loss, inasmuch as the neglect of the owner in not apprizing the carrier of the extraordinary value of the parcel, in order that extraordinary care might have been taken of it, may have been the occasion of that loss. The actual value of the article may have transpired and become known to the carrier's servants, and have tempted them to be dishonest and purloin the money, and the concealment of its existence consequently might have been the cause of the loss, inasmuch as it has prevented the carrier from taking that care of the money which he would otherwise have done. Thus in the cases previously alluded to, where the consignor concealed 100*l* amongst the hay in the old nail bag, ^(p) and a quantity of guineas in an ordinary brown paper parcel, ^(q) and two hundred sovereigns in six pounds of tea, ^(r) and it was held that the carrier was not responsible for the loss of them, the concealment by the consignor of the existence of the money, and the

^(m) *Smith v. Horne*, 8 Taunt. 144. 2 Moore, 18, s. c. *Steat v. Fagg*, 5 B. & Ald. 342.

⁽ⁿ⁾ *Birket v. Willan*, 2 B. & Ald. 356. *Garrett v. Willan*, 5 B. & Ald. 63, per Best, J. *Duff v. Budd*, 6 Moore, 469. *Wyld v. Pickford*, 8 M. & W. 443, 461.

^(o) Per Cur. *Riley v. Horne*, 2 M. & P. 341. *Helby v. Mears*, 5 B. & C. 507, 508; 8 D. & R. 293, 294, s. c.

^(p) *Gibson v. Paynton*, 4 Burr. 2301.

^(q) *Clay v. Willan*, 1 H. Bl. 298.

^(r) *Bradley v. Waterhouse*, 3 C. & P. 818.

real value of the parcel bailed to the carrier to be carried, may fairly be presumed to have occasioned the loss. "The degree of care that a man may be reasonably required to take of anything, depends upon the quality and value of the thing, and the temptation it affords to theft. *Magno periculo custoditur quod multis placet*, and it cannot be denied that a box of notes or money affords much greater temptation to theft than a parcel of equal size containing less valuable articles."^(s) It is obvious that a bag filled with bank notes requires more care for its conveyance than a bag filled with hay, and a packet of sovereigns than a packet of tea. The actual value of the parcel may have transpired unknown to the carrier, and have invited depredation and occasioned the loss, and if so, the consignor himself is the cause of his own misfortune, and has no claim either in law or in conscience against the carrier for compensation. Had the latter been made aware of the unusual value of the parcel entrusted to him, he might have taken proper means to secure himself against the increased risk, and "the holding out by the consignor as an ordinary risk what is in reality an extraordinary risk is a legal fraud—*dolus malus*,—and *ex dolo malo non oritur actio*."^(t)

If, therefore, glass or china, or any brittle or perishable commodity requiring great care for its safe conveyance, is bailed to a carrier inclosed in boxes and cases, and no notice is given him of the peculiar nature of the contents of such boxes or cases, and of the increased care requisite for their safe carriage, the carrier is, in his character of a bailee for hire, bound only to take that ordinary care of the thing which its general character and appearance seemed to require, and if it is broken or injured without any gross negligence on the part of the carrier or his servants, the carrier is not responsible for the damage sustained, as the consignor has himself been the cause of the loss or injury by concealing the peculiar nature of the articles and the increased risk, and so preventing the carrier from providing additional assistance and care, and safe means of conveyance, and also of obtaining a higher rate of remuneration proportioned to the augmented danger of loss.^(u)

When, however, the consignor has been guilty of no intentional deception to conceal the risk, and his own conduct or omission to declare the nature and value of the article has not in any way conduced to the loss, but the loss has been caused solely by the negligence and want of care of

^(s) Abbott, C. J., 4 B. & Ald. 42.

^(t) Bayley, J., *Batson v. Donovan*, 4 B. & Ald. 37. *Lowe v. Booth*, 13 Pr. 329. *Mayhew v. Eames*, 5 D. & R. 487; 3 B. & C. 601.

^(u) Misrepresentation on the part of the consignor conducing to the loss, must be specially pleaded. *Webb v. Page*, 6 Sc. N. R. 956.

the carrier, the latter is, in his character of a bailee for hire, bound by the common law to make compensation for the loss so occasioned to the extent, at all events, of the apparent and presumable value of the article at the time it was bailed to him to be carried. But he is not, it seems, by the common law responsible for any extraordinary or unusual value which may have accidentally been imparted to it, and which could not from the apparent nature and general character and appearance of the thing be fairly presumed to exist. Thus where the plaintiff had put a 50*l.* bank note into his carpet bag, and got on a coach and delivered the carpet bag to the coachman, and on the arrival of the coach at its place of destination, the bag was missed and never afterwards seen; the jury gave a verdict for the value of the linen and wearing apparel, but not for the value of the note, and the court afterwards refused to increase the verdict by the amount of the note.^(x) In other cases, however, the plaintiff has been permitted to recover the full value of the article lost.^(y)

Notices on railway tickets limiting the liability of railway carriers.—Many railway companies are in the habit of delivering to parties booking horses and carriages for conveyance by their trains, a ticket for the carriage of such horses, containing a notice to the effect that the ticket is issued subject to the owners undertaking all risks of conveyance whatsoever, and declaring that the company will not be responsible for any injury or damage, however caused, occurring to horses or carriages travelling upon the line. The effect of such a notice, when its delivery to the person bringing the horses to the station can be proved,^(z) is, to release the company altogether from its customary liability as an INSURER of the safety of the horses and carriages from the hazards and contingencies of railway travelling, but it does not exempt it from losses and accidents arising from its own negligence and want of care, nor from the negligence and want of care of its own servants and persons in its employ.^(a)

A distinction has been sought to be made in many of the cases between what has been termed a misfeasance and a neglect of those implied duties and obligations which result from a contract for the letting and hiring of the labour and care of carrying goods.—But observes Mr. Justice Best, “I cannot see, with reference to the question of the responsibility of the carrier, that there is any sound distinction between negligence and misfeasance. I am of opinion that by the common law a carrier is an-

^(x) *Miles v. Cattle*, 4 M. & P. 630; 6 Bing. 743, s. c.

^(y) *Sleat v. Fagg*, 5 B. & Ald. 342. *Walker v. Jackson*, 10 M. & W. 161; 2 M. & P. 342.

^(z) *Palmer v. Grand Junc. Rail. Co.*, 4 M. & W. 749, 765.

^(a) *Ante*, 814, 815; *Parke, B.*, 12 M. & W. 771.

swerable," although he may have given the usual notice "for the negligence as well as the misfeasance of his servants. . . . I am of opinion that by these notices the carrier is only protected from that responsibility which belongs to him as an INSURER, that is a principle which all mankind can understand; and I think that we ought in such cases as these to lay down rules which may be easily comprehended by the great body of the public."(b)

To enable the carrier to avail himself of the protection of these notices, it must be shown that they have come either actually or constructively to the knowledge of the consignor or owner.(c) If they are posted up in the carrier's receiving office, they must be written or printed in large and easily legible characters, and must be affixed in a conspicuous position so as to be visible to all who book goods for conveyance.(d) If the carrier relies on the distribution of printed handbills, he must show that one of them was actually delivered to the owner or to the person bringing, the goods to the office for conveyance.(e) If advertisements in the public papers, on the other hand, are relied upon as conveying notice to the owner, it must be shown that the latter was in the habit of taking in the newspaper in which these notices were inserted.(f)

Waiver of the notice.—The notice of the carrier limiting or qualifying his liability may of course at any time be set aside and rendered nugatory by an express contract between the carrier or his servants and the consignor. Thus, where the Grand Junction Railway Company, who are carriers on their line of railway, published a printed notice, which was fixed up over the door of their station, to the effect that all goods received after four o'clock P. M. would not be forwarded until the next working day, but the company was in the habit, notwithstanding this notice, of forwarding goods for the plaintiff delivered at the station after four o'clock, and the company's weigher, on a particular evening, told a servant of the plaintiff who brought perishable goods to the station after the hour limited by the notice that there was then "plenty of time," and the goods were left upon the faith of this assurance; it was held that there was

(b) 5 B. & Ald. 63, 64. And see *Wyld v. Pickford*, 8 M. & W. 460, 461. *Hinton v. Dibbin*, 2 Ad. & E. n. s. 658.

(c) Notice to the consignor or his servant is notice to the consignee. *Maving v. Todd*, 1 Stark. 72.

(d) *Butler v. Heane*, 2 Campb. 415. *Clayton v. Hunt*, 3 Campb. 27. *Walker v. Jackson*, 10

M. & W. 178. *Clark v. Gray*, 4 Esp. 177. *Kerr v. Willan*, 2 Stark. 53. *Davis v. Willan*, ib. 280.

(e) *Palmer v. Grand Junction Railway Company*, 4 M. & W. 749; 7 Dowl. 232, s. c.

(f) *Rowley v. Horne*, 3 Bing. 2; 10 Moore, 247, s. c.

evidence to go to a jury of a special contract on the part of the railway company to forward the goods the same evening. (g)

These, therefore, are the responsibilities and liabilities cast by the common law upon common carriers of goods for hire. "And all these diversities be granted by secondary conclusions derived from the law of reason without any statute made in that behalf; and, peradventure, laws and the conclusions therein be the more plain and the more open, for if any statute were made therein, I think verily more doubts and questions would arise upon the statute than doth now when they be only argued and judged after the common law." (h) The correctness of this opinion of the learned writer of "Doctor and Student" has now been verified by experience.

CARRIER'S ACT.—By the 11 Geo. 4 and 1 Wm. 4, c. 68, commonly called the Carrier's Act, reciting that, by reason of the frequent practice of bankers and others of sending by the public mails, stage coaches, waggons, vans, and other public conveyances by *land* for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage-coach proprietors, and common carriers for hire is greatly increased; and that through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors, stage coach proprietors, and other common carriers, by due diligence, to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors, stage-coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses; it is enacted, that no mail contractor, stage coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any gold or silver coin of this realm, or of any foreign state, or any gold or silver in a manufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the Banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign; stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plates, or plated articles, glass

(g) *Pickford v. Grand Junction Railway Company*, 12 M. & W. 766.

(h) *Doct. & Stud. Dial.* 2, ch. 38.

china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such article or articles or property contained in such parcel or package shall exceed the sum of TEN POUNDS, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail contractor, stage-coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same; and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package. And (s. 2) that when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of TEN POUNDS, it shall be lawful for such mail contractors, stage coach proprietors, and other common carriers, to demand and receive an INCREASED RATE OF CHARGE, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving-house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charges required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles, and all persons sending or delivering parcels or packages containing such valuable article at such office shall be bound by such notice, without further proof of the same having come to their knowledge.

And (s. 3) that when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the person receiving such increased rate of charge, or accepting such agreement, shall, if required, sign a receipt for the package or parcel acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice shall not have been affixed, the mail contractor, stage coach proprietor, or other common carrier shall not have or be entitled to any benefit or advantage under the act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge. Also (s. 4) that

no public notice or declaration shall be deemed or construed to limit or in anywise affect the liability at common law of any such mail contractors, stage coach proprietors, or other public common carriers for or in respect of any articles or goods to be carried and conveyed by them; but that they shall be liable, as at the common law, to answer for the loss of, or injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability notwithstanding.

Also, (s. 5,) that every office, warehouse, or receiving-house which shall be used or appointed by any mail contractor, or stage coach proprietor, or other common carrier for the receiving of parcels to be conveyed shall be deemed and taken to be the receiving-house, warehouse, or office of such mail contractor, stage coach proprietor, or other common carrier; (s. 6) and that any one or more of such mail contractors, stage coach proprietors, or common carriers shall be liable to be sued by his, her, or their name or names only; and that no action or suit commenced to recover damages for loss of or injury to any parcel, package, or person shall abate for the want of joining any co-proprietor or co-partner in such mail, stage coach, or other public conveyance by land for hire as aforesaid. But (s. 6) nothing in the act contained shall extend or be construed to annul or in any wise affect any special contract between such mail contractors, stage coach proprietors, or common carriers, and any other parties, for the conveyance of goods and merchandizes. Also, (s. 7,) that where any parcel or package shall have been delivered at any such office, and the value and contents declared, and the increased rate of charge paid, and such parcels or packages shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled to recover back such increased charges in addition to the value of such parcel or package.

And (s. 8) that nothing in the act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire from liability to answer for loss or injury to any goods or articles arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct. Also, (s. 9,) that such mail contractors, stage coach proprietors, or other

common carriers for hire shall not be concluded as to the value of any parcel or package by the value declared, but that he or they shall in all cases be entitled to require from the party suing' in respect of any loss or injury, proof of the actual value of the contents by the ordinary legal evidence, that the mail contractors, stage coach proprietors, or other common carriers as aforesaid shall be liable to such damages only as shall be so proved, not exceeding the declared value, together with the increased charge as before mentioned.

This act, it will be observed, applies solely to carriers by *land*, and the effect of it is to prevent the owner or consignor from recovering from the carrier the value of any of the enumerated articles when the value of the contents of the parcel or package in which they are inclosed exceeds 10%, and the value has not been declared, and the increased rate of charge paid by the consignor pursuant to the statute. (*k*)

Uninsured parcels consisting of enumerated and unenumerated articles.—If the contents of the parcel or package are of a miscellaneous character, consisting partly of enumerated articles and partly of things not mentioned or comprised in the act, the carrier is released from all liability in respect of the former, but as regards the latter the common law liability of the carrier remains the same as before the passing of the statute. Thus, if a trunk containing linen and wearing apparel, jewellery and trinkets, be delivered to a carrier to be carried for the ordinary hire, or to accompany the person of a passenger, and such trunk is lost by the way, the carrier is not liable for the value of the jewellery and trinkets, provided he has posted up the required notices, but he remains responsible for the value of the trunk and linen and wearing apparel, as at common law before the passing of the act.

Uninsured parcels consisting solely of enumerated articles.—If, however, the contents of the parcel or package consist entirely of the enumerated articles, the carrier is by the express terms of the act freed from all responsibility and liability in respect of the loss thereof, although such loss may have been occasioned by the grossest negligence and misconduct on the part of the carrier, his servants, or agents. Thus where a bale of silk of great value was delivered to a carrier, to be carried for the ordinary hire, and was lost through the gross negligence and misconduct and entire want of care of the carrier, it was held that the owner was precluded by the act from recovering compensation from the carrier for the loss of the parcel,

(*k*) The want of notice of value must be specially pleaded. *Syms v. Chaplin*, 5 Dowl. P. C. 429.

as he had not declared the nature and value of the article, and paid the increased charge according to the rates specified in the notice posted in the carrier's office.⁽¹⁾ If an uninsured parcel or package consists entirely of enumerated articles, the plaintiff would not, it seems, be entitled to recover even the value of the box or case in which they are contained.⁽²⁾

The eighth section of the statute provides, it will be observed, that the act shall not protect the carrier from his common law liability in respect of the felonious acts of his servants, and that it shall not protect the coachman, guard, bookkeeper, or other servant from liability for losses or injuries occasioned by their own personal neglect and misconduct. As regards the latter part of the section it may be remarked, that the coachman, guard, or other servant of the carrier is not by the common law liable in any way *ex contractu* to the owner of the goods for loss or damage arising from his own personal negligence. The contract for the carriage of them is made with the carrier or coach proprietor who carries on the business, and not with a mere servant or agent of the carrier who has no interest in the concern, and does not share in the profits of the business. Thus where an action was brought against a coach porter for the value of a parcel lost by him, and also against the driver of a stage coach for the loss of a trunk, it was held that as the defendant in each case had received the article as the servant and agent of the coach proprietor and not on his own account, he could not be sued by the owner of the goods for the loss, but that the remedy of the latter was upon the contract with the master.⁽³⁾

As the law at present stands, therefore, the carrier may accept a bale of silk, a cart load of furs, or a case of maps, or any other article enumerated in the act, may receive the hire and enter into a contract for its conveyance according to an address given, and be guilty of the grossest breach of faith and never deliver the goods to the consignee, and yet the owner has no remedy against him for his breach of contract if he has omitted to insure the goods and pay the premium for insurance according to the increased rate of charge posted in the carrier's office. It is difficult to see why parties should be *compelled* TO INSURE and pay the premium for insurance, when there is no extraordinary risk to be run. Such an arrangement may be exceedingly advantageous to the carrier, but it is oftentimes expensive and inconvenient to the public. The owner of the goods may be quite ready

(1) *Hinton v. Dibbin*, 2 Ad. & E. n. s. 646;
2 G. & Dav. 28.

(2) *Wyld v. Pickford*, 5 M. & W. 408, 402.

(3) *Cavanagh v. Such*, 1 Pr. 331. *Williams v. Cranston*, 2 Stark. 82. *Buller, J.*, 5 T. R. 397; *Ld. Kenyon*, 3 T. R. 533.

to stand to all the ordinary risks and hazards of the road, and may desire only to receive at the hands of the carrier that amount of care and caution which is necessary for the faithful and due conveyance of the property, and the *bonâ fide* execution of the contract for the carriage of them. For the exercise of this labour of care which is inseparable from the labour of conveyance, the carrier receives his hire, and whilst it may be right to protect him from his risk as an INSURER, unless the goods he conveys are insured and paid for, he ought not in justice to the public to be released from those ordinary duties and obligations naturally resulting from his contract, and which are essential to the maintenance of good faith. If, indeed, the nature and quality of the parcel have been concealed, and such concealment has in any way increased the risk, or contributed to the injury or the loss, then the carrier ought to be released, as he is released, as we have before seen, (*ante*, 816, 817,) at common law and by numerous decisions of the courts, from all responsibility and liability in respect of such injury or loss.

Construction of the CARRIER'S ACT.—The statute extends to all the articles enumerated in the first section, although not within the words of the preamble, "an article of great value in a small compass," and to entitle a party to recover for loss of or injury to any article of the description mentioned, express notice must be given to the carrier of the nature and value of the article, and the increased rate of remuneration paid, or an engagement to pay the same be accepted by the person receiving such article for conveyance. It is not sufficient for the owner to describe in writing on the outside of a parcel or box the nature of the contents. The carrier must have distinct information thereof, and an opportunity of demanding the increased rate of carriage.

Glass.—A looking-glass of considerable size, and exceeding the value of £10, was delivered packed up in a case at a carrier's receiving office. On the outside of the case was written, "Plate glass, keep this edge upwards," but no declaration was made of the nature and value of the article, and no increased rate of carriage paid. The glass was accidentally broken during the journey, and it was held that as no specific notice had been given to the carrier, and no increased remuneration, or engagement to pay the same had been given to enable him to guard the property from the ordinary hazards of the road, he was not responsible for the damage that had been sustained. (*o*)

(o) *Oxen v. Burnett*, 2 C. & M. 353; 4 Tyr. 133, *n. c.* *Boys v. Pink*, 8 C. & P. 361.

Furs—Trinkets—Silks.—Hat bodies made of felt, which is a substance composed partly of the soft fur or down of the rabbit detached from the skin, and partly the wool of sheep, have been held not to be *furs* within the description of the carrier's act, (p) and wearing apparel and dresses made up for use seem not to come within the operation of the act. Thus it has been held that silk dresses made up for wear do not come within the meaning of the term "silks," (q) and it would, therefore, probably be holden that boas and tippets and comforters in a lady's trunk would not be "furs" within the meaning of the act. Lord Abinger is reported to have held that eye-glasses set in gold with gold chains attached to them to be hung round the neck of the wearer, are not "trinkets," (r) and are not included amongst the enumerated articles. The gold, however, is gold in a manufactured state, but as the article may be thought to be often a necessary article of wearing apparel, it may possibly be considered not to come within the scope and meaning of the statute on that ground.

LIABILITY of the EMPLOYER of the COMMON CARRIER.

Payment of the FARE or HIRE.—Carrier's LIEN.—We have already seen that when credit has not by the express contract of the parties been given for the payment of the price of the carriage of goods, the delivery of the goods to the consignee, and the payment of the price of the carriage of them, are concurrent acts to be performed at the same time, so that the carrier is entitled to retain possession of the things he has carried, until he receives or is tendered his hire for their conveyance. (s) If the consignee refuses to accept them, the carrier then holds them at the disposal and for the benefit of the consignor, and is entitled to look to the latter for the payment of his hire. (Ante, 254 .) But the carrier has no right of lien by the common law for anything beyond the price of the carriage of the goods conveyed. He cannot detain them until he has received payment of a general balance due to him from the owners of such goods. (t) Common carriers have oftentimes attempted to obtain a lien of this description, and to secure the payment of debts due to them for the previous conveyance of goods, by giving notices to the effect that all goods delivered to them for conveyance will be holden as a security for the payment of such debts, as well as for the payment of the price of their own

(p) *Mayhew v. Nelson*, 6 C. & P. 58.

(q) *Davey v. Mason*, Car. & M. 45.

(r) *Davey v. Mason*, Car. & M. 50.

(s) *Holt, C. J., Yorke v. Grenaugh*, Raym.

867.

(t) *Rushworth v. Hadfield*, 6 East, 519; 7 East, 224. *Butler v. Woolcott*, 2 N. B. (5 B. & P.) 64. *Storr v. Crowley*, M'Clel. & Y. 137.

carriage.(u) But the common carrier has no right to make any such bargain or stipulation. He is bound, as we have already seen, so long as he has room in his cart or carriage, to convey the goods of all persons on being tendered his hire for the carriage of the particular goods sought to be conveyed,(x) and if he does obtain a promise from the consignor to the effect that he shall, if he carries the goods, have a right to retain them in his hands as a security for the payment of an antecedent debt, such promise is a mere nudum pactum of no force or effect in the eye of the law. (Ante, 22, 28.)

If a person goes to a coach office, and orders a place to be booked for him by a particular coach, and that be done, and he then leaves his portmanteau at the coach office, the coach proprietor will have a lien upon the portmanteau for his reasonable and customary remuneration and charge in such cases, but not for the full amount of the coach fare. If the party merely leaves his portmanteau, and no place is booked, the coach proprietor has no lien upon the portmanteau at all.(y) When goods delivered to be carried, are received from the waggon of the common carrier by the consignee, and are merely carried into the warehouse to be weighed, the carrier has no right to charge for warehouse-room, and if the goods are taken up on the road, and have never been booked, he has no right to charge for the booking of them; and if after tender of the price of the carriage he detains them for these small charges, the detention is unlawful, and an action may be brought against him in respect thereof.(z)

A common carrier of passengers and luggage has a right of lien upon the luggage for the payment of the price of the carriage of the passengers as well as of his effects; but he has of course no right to detain the person of the passenger or the clothes he is actually wearing.(a) And if the carrier once parts with the possession of the goods, he loses his lien as in other cases. But if he loses the possession by fraud, the lien revives if possession is recovered.(b)

Common carriers' CHARGES must be fair and reasonable, and according to the ordinary and customary rate of remuneration. They cannot charge more than the customary hire, but there is nothing to prevent them from charging less. If a person sends to a carrier's office to know his rate of charge, the carrier is bound by the representation there made by his clerks, and if goods are sent upon the faith of such representation, the carrier

(u) *Wright v. Snell*, 5 B. & Ald. 353.

(x) Ante, s. 8. *Jones v. Turlington*, 9 M. & W. 677; 1 Dowl. N. S. 625.

(y) *Higgins v. Brakerton*, 5 C. & P. 2.

(z) *Lambert v. Robinson*, 1 Esp. 119.

(a) *Wolf v. Summers*, 2 Campb. 631.

(b) *Wallace v. Woodgate*, B. & M. 194.

cannot charge more than the sum named, although the clerk may have inadvertently fallen into a mistake.(c)

Railway CHARGES.—By an act of parliament, under which a railway company was incorporated, it was provided that the charges for the carriage of goods be reasonable and equal to all persons. The company itself acted as a common carrier of goods for the public, and issued certain scales of their charges for the carriage of goods, including the collection, loading, unloading, and delivery. They also carried goods for other carriers, to whom they made certain allowances for collection, &c., performed by such carriers. In their dealings, however, with a particular carrier, they refused to make such allowances, and it was held that the charges to such carrier were not equal or reasonable, and that such carrier might recover from the company divers extra charges paid by him over and above what had been charged to other carriers and to the public, in an action for money had and received, such payments not being voluntary, but made in order to induce the company to do that which they were by law bound to do without requiring such payments. And it was held, also, that all acts of parliament conferring privileges upon companies are to be construed strictly against the company, and liberally as regards the public.(d)

If a railway company makes and posts at the offices and stations a bye-law to the effect that every passenger who loses his ticket shall be liable to pay the full fare from the most distant station on the line, the company has no power to enforce this bye-law by detaining the person of a passenger who has lost his ticket and refuses to pay the specified amount.(e)

(c) *Wingfield v. Packington*, 2 C. & P. 600.

(d) *Parker v. Gt. West. Rail. Co.* 7 M. & Gr. 253; 7 Ec. N. R. 885, a. c. As to what are not reasonable and equal charges, see *Pickford v.*

Grand Junct. R. Co. 10 M. & W. 399; 3 Rail. Cas. 193.

(e) *Chilton v. Lond. and Croyd. Rail. Co.* (Exchr.) Nov. 27th, 1846.

CHAPTER XXV.

GRATUITOUS BAILMENTS.

SECTION I.—*Deposit or simple bailment without reward.*—Nature of a deposit—Deposits how made—Implied engagements and liabilities of a depositary—Restoration of the deposit—Liabilities of shareholders—Interpleader act—Liabilities resulting from the taking possession of goods by finding—Implied engagements and liabilities of the depositary.

SECTION II.—*Mandate or gratuitous commission.*—Nature and requisites of a mandate—Liabilities and implied engagements of the mandatary—Bailments of chattels to be carried gratuitously—Bailments of chattels to be mended or repaired gratuitously—Bailment of money for investment—Bailments of living animals to be fed and taken care of—Bailments of perishable commodities to be watched and tended—Liabilities of the mandator.

SECTION III.—*Commodatum and mutuum or gratuitous loan.*—Liabilities of the borrower—Of the care and vigilance to be exercised for the safety and preservation of a thing borrowed by way of *commodatum*—Restoration thereof—Repayment of things borrowed by way of *mutuum*—Countermand of the loan.

SECTION I.

OF A DEPOSIT OR SIMPLE BAILMENT WITHOUT REWARD.

A *DEPOSIT* or *SIMPLE BAILMENT*, styled by the Roman lawyers *DEPOSITUM*, may be defined to be a delivery or bailment of goods in trust to be kept for the bailor and redelivered on demand.^(a) It is of the very essence of a deposit that it be gratuitous, for if anything is to be paid for the care and custody of the article, it immediately becomes a contract for the letting and hiring of labour and services and care to be employed upon the chattel, and belongs to the class *LOCATIO OPERIS ET CUSTODIÆ*. (*Ante*, 754, 772.)

(a) Dig. lib. 16, tit. 3, 1, § 45, § 46. *Ante*, 769, 770, as to bailments in general.

In the Roman law the term *depositum* is applied to the delivery of realty to be kept for the owner as well as to a delivery of personalty. Thus when a man during his absence from home committed his house, and all that was in it, to the keeping of a friend, this was called a deposit by the civilians. In the absence of an express contract between the parties, the nature of the bailment must be determined by the nature of the thing bailed, and upon what is required to be done for its preservation and safe keeping. When passive custody in some secure place of deposit alone is required, as in the case of most bailments of inanimate chattels, the bailment is a naked deposit or simple bailment, whilst if work and labour, services and skill are necessarily required for its preservation, as in the case of bailments of living animals or perishable chattels, then the bailment becomes, as presently mentioned, a MANDATE.

DEPOSITS *how made*.—In order to create and constitute a deposit, the subject matter of the bailment must be either actually or constructively delivered to the bailee, or it must be in his possession or under his control at the time he undertakes the charge of it. A mere promise to take charge of a thing which has never either actually or constructively come into the possession of the promisor, cannot of course constitute a DEPOSIT. But a delivery to the servant of the promisor, or to a person whom he has appointed to receive the chattel, and who has assented to hold it on his behalf, or any acts on the part of the promisor manifesting a clear intention to take charge of a thing which is not capable of manual delivery, but which has been placed at the disposal and under the control of the promisor, will constitute the latter a depositary in contemplation of law.^(b) Thus, in the Roman law, if a man went from home leaving the keys of his house with his neighbour, the bailee of the keys was considered to be the depositary of the house. If a creditor holding a pledge receives payment of the debt, but continues to hold the pledge, he becomes a depositary of the latter for his *quondam* debtor. So if a tradesman sells any specific chattel, but neglects to deliver it, he becomes the depositary of the purchaser. But a man cannot be made a depositary without his knowledge and consent; he cannot have the possession of another man's property with its accompanying duties and responsibilities forced upon him against his will. Thus, if a tradesman anxious to sell his wares and merchandize sends them to my house without any previous communication with me, and without having obtained my previous consent, and they are taken in by my servant, and in my absence, or without my knowledge, I

(b) See ante, p. 55 to 67, as to actual and constructive delivery.

do not by reason thereof become the depositary of the goods, and clothe myself with the care of them.(c) A servant left in charge of my house has authority to receive for me whatever I have directed to be sent home, or to be delivered into my possession, but not things that may be left by mistake, or without my sanction or authority. If a man brings goods to a house without the warrant of the master, under circumstances naturally leading to the conclusion that they have been ordered to be left by the latter, this is a fraud upon the servant who takes them in, and the acceptance of them under such circumstances does not impose either upon the servant or the master the duties and responsibilities of a depositary.

In the Roman law there are various kinds of deposits giving rise to a greater or less degree of liability according to the circumstances under which the deposit was made, or the events which might subsequently arise. Thus, if the deposit was made under pressing necessity, such as a fire, a shipwreck, or some overwhelming calamity, it was called "*miserabile depositum*," and if the depositary was guilty of any default or neglect of duty he was bound to make compensation to the depositor to the extent of double the value of the article, or twice the damage or loss actually sustained. But if the deposit was a voluntary deposit made for the mere convenience of the depositor, and not under the pressure of misfortune, the depositary was only liable to the extent of the actual damage.

IMPLIED ENGAGEMENTS *and* LIABILITIES *of the* DEPOSITARY.

A depositary is in general bound to take the same amount of care of things intrusted him to keep that he has ordinarily taken of his own property. He will be liable to make compensation to the owner if the goods are damaged and lost by reason of *gross* negligence in the keeping of them, but he is not responsible for common neglect or ordinary casualties. Any wilful abuse of the thing deposited, or such an amount of neglect or want of care as appears to be incompatible with ordinary good faith between man and man will amount to gross negligence.(d) Thus, if a man takes charge of money and leaves it upon a shelf in an open drawer, in a place of public resort, when he might have placed it under

(c) *Lathbridge v. Phillips*, 2 Stark, 544.

(d) Holt, C. J., *Coggs v. Bernard*, 2 Raym. 909. *Lane v. Cotton*, 1 ib. 655. *Gibson v. Paynton*, 4 Burr. 2,300, Nisi tamen ad suum mo-

dum curam in deposito præstat fraude non caret. Nec enim salvâ fide, minorem iis quam suis rebus diligentiam præstabit. Dig. lib. 16, tit. 3, 32.

lock and key, this is a want of care inconsistent with good faith, and amounts consequently to gross negligence.(e)

The amount of care to be exercised in the selection of a safe place of deposit for a particular chattel is usually regulated by the degree of danger of loss. A man might leave a ton of coals or a load of hay unguarded and unwatched on a public wharf without any imputation of gross negligence or of any neglect at all, but if he were to do the same with a cargo of silks or wines, he would be pronounced guilty of gross neglect. The nature and value of the article is a necessary ingredient in the consideration of every question of negligence. A man would not be expected to take the same care of a box of ninepins as of a box of diamonds;—of a bag of marbles as of a bag of sovereigns; or the same care of a common sign board as of a rare painting; what might be care and diligence in the keeping of the one thing would be gross negligence in the custody of the other.

If a package or a box, sealed or locked, be deposited, and the depositary is not made acquainted with the contents, he is bound only to take that care of the article which its general appearance seems to require; and in case it should be lost or destroyed through gross neglect, he will only be liable to the extent of the apparent value of the article without reference to the contents, but if he is made acquainted with the contents—if he is told that the box contains gold or jewels, glass or china, of great value, he is then bound to exercise a degree of care proportioned to the proper keeping of such articles, and if he then exposes the box in unsafe places, or subjects it to rough or improper treatment, and the contents are damaged or destroyed, he must make compensation to the owner to the full extent of the injury sustained.(f)

The degree of care which the depositary is bound to take in the selection of a safe place of deposit is (as previously mentioned) that degree of care which he has been *in the habit* of extending to his own property. In reference to this rule it has been thought that if the depositary loses his own goods at the same time that he loses the deposit, he shall not be answerable, as he has taken as much care of the latter as of his own property. The question of liability, however, is not to be determined by

(e) *Doorman v. Jenkins* 2 Ad. & E. 256; 4 N. & M. 173. Domat. L. 1, tit. 7, s. 3, 4. Dig. lib. 50. tit. 16, 223. *Jones v. Lewis*, 2 Ves. sen. 240.

(f) *Bonion's case* Pasch. 8 Edw. 2. Mayn. Year Book, 275. Fitz. Abr. Detinue 59. Brk. Inst. B. s. tit. 1, § 27, p. 490; 1 Stark. 239;

Domat. dep. 1. 17. Si cista signata deposita sit, utrum cista tantum petatur; an et species comprehendendæ sint? et ait Trebatius cistam repetendam, non singularum rerum depositi agendum. Quod si res ostensæ sunt; et sic depositæ adjiciendæ sunt et species vestis. Dig. lib. 16, lex 1, § 41.

what the depositary may have done in the particular instance, but by his general habits and character, and mode of life, and the degree of care he has *ordinarily* bestowed upon his own property. If he has been guilty of gross neglect, he cannot excuse himself from liability by showing that he lost his own goods at the same time that he lost his neighbour's.^(g) Thus, where a coffee-house keeper took charge of a sum of money, and put it with a larger sum of money of his own into his cash-box, which he left in the public tap-room of his coffee-house, from whence it was stolen, it was held that the circumstance of his having lost his own money, together with the deposit, would not exculpate him from the charge of gross negligence.^(h)

The law, however, expects the depositor to exercise a reasonable amount of vigilance in the protection of his own interests, and if he will blindly and without making any previous inquiry go and deposit goods in the hands of a person of weak intellect, or a child, or a minor, without experience, or a notoriously idle and careless, or drunken fellow, he cannot expect the same care from them, as from a prudent and cautious house-keeper; and if the goods are injured or lost by the gross negligence of such depositaries, he must bear the consequence of his own rashness and folly, and put up with the loss. Having himself been guilty of gross negligence in the first instance by intrusting property to a person of whom he knew nothing, and into whose previous habits and character he did not trouble himself to inquire, he has no ground either in foro conscientiæ or in point of law to charge the bailee with the loss. Having invited the disaster himself he must bear the brunt of it.⁽ⁱ⁾ So if after the deposit the depositary becomes of unsound mind, or falls into drunken or disorderly habits, and the depositor is near at hand, and has full knowledge thereof, but makes no attempt to protect himself by withdrawing the deposit, and a loss afterwards occurs, the law will not help him to obtain redress. But if after having trusted his property to the care of a person of character and reputation, he were to depart to a distance and deprive himself of the power or opportunity of retaking it, the depositary would continue respon-

(g) "There are some expressions in Lord Holt's judgment from which a superficial reader might infer that his lordship thought a depositary would always be secure provided he kept the goods deposited with as much care as his own, but on looking attentively at the whole context it appears that his lordship considered the bailee's keeping goods deposited as he kept his own as an argument against the supposition that gross negligence had been committed rather than as any sub-

stantial ground of discharge." 1 *Smith's* leading cases, 99.

(h) *Doorman v. Jenkins*, 2 Ad. & E. 258; 4 N. & M. 170, a. c. *Nelson v. Mackintosh*, post.

(i) Quia qui negligenti amico rem custodientem tradit sibi ipsi et propriæ fatuitati hoc debet imputare. Brac. Lib. 3, 99. b.; Inst. lib. 3 tit. 15, § 3. Dig. lib. 16, tit. 3, 32. Holt, C. J., *Coggs v. Bernard*, 2 Raym. 914, 915.

sible for its safety. And if the deposit had been made under the pressure of an overwhelming necessity, or upon some sudden emergency, the law would probably throw an increased amount of liability and responsibility upon the shoulders of the bailee by reason of the confidence necessarily reposed in him.

If a depositary commits a breach of trust and sells the deposit, the depositor may maintain an action of trover against the purchaser for the recovery of the value of the deposit if the latter neglects to yield it up on demand.^(k) If goods are bailed by *A.* to *B.* to be kept by the latter, and *B.* bails them to *C.*, who uses and wastes the goods, *C.* is liable to an action at the suit of *A.* for the recovery of compensation for the damage sustained.^(l)

A depositary has no right to make use of the deposit for his own benefit and advantage, if he does so, and the thing is lost or injured, or deteriorated in value through such user, the depositary must make good the loss.^(m) If, however, the subject matter of the bailment be a living animal, such as a hound, or a horse, which requires air and exercise, the bailee has an implied authority from the owner to use it to a reasonable extent, and is under an implied engagement to give it proper air and exercise.⁽ⁿ⁾ If a sum of money is bailed by one man to another under circumstances fairly leading to the presumption that the bailee had authority from the bailor to use it or not as he may think fit, the bailee will stand in the position of a mere depositary, or he will be clothed with the increased duties and liabilities of a borrower according as he may or may not have thought fit to avail himself of the privilege of user impliedly accorded to him. If he puts the money into a coffer, or bag, and refrains from using it, and so preserves its identity with the intention of restoring it *in individuo* to the bailor, he undertakes the duty of a mere depositary,^(o) and he is bound only to take the same care of the deposit that he was in the habit of bestowing upon his own money, and he would not be responsible for loss by robbery, fire, or any other casualty. But if he were to mix the sum deposited with his own monies with the intention of restoring an equivalent, and so destroy the identity and individuality of

(k) *Cooper v. Willomat*, 1 C. B. 672. *White v. Spettigue*, 13 M. & W. 603.

(l) 12 Ed. 4. fol. 13, pl. 9. 13 Ed. 4. fol. 9, pl. 5. *Loeschman v. Machin*, 2 Stark. 311. *Isaac v. Clark*, 2 Bulstr. 309. *Buxton v. Baughan*, 6 C. & P. 674.

(m) In the Roman law the unauthorized use of the deposit amounted to a gross breach of trust

involving the criminality of theft. *Instit. lib. 4. tit. 1. § 6.* *Cod. lib. 4, tit. 34. § 3* *Dig. lib. 16, tit. 3, 29.* *Merry v. Green*, 7 M. & W. 623

(n) *Post. s. 3. (MANDATE.)*

(o) *Si pecunia apud te ab initio hac lege deposita sit, ut si voluisses utereris prorsusquam utaris, depositi teneberis.* *Dig. lib. 16, tit. 3, l. § 34.*

the subject matter of the bailment, this would be a user of the money which would at once alter the nature and character of the bailment, converting it into a loan for use and consumption with its increased duties and responsibilities. (*p*)

In ordinary cases of deposits of money with bankers, the transaction amounts to a mutuum or loan for use and consumption, it being understood that the banker is to have the use of the money in return for his consent to take charge of it. A depositary to whom a sum of money has been bailed to be kept, would naturally be justified in selecting a respectable bank as a place of deposit. If he pays in the money in the name of the depositor, and places it to the account of the latter, the amount then remains in the bank at his, the depositor's risk, and if the banker fails, the depositor must bear the loss, but if the depositary pays in the money to his own account and his own credit, this is of course a user of the money for which the latter shall be responsible. If he had an implied authority to use the money and has so exercised it, then he stands as before-mentioned in the position of a borrower for use and consumption. In either case he is bound to make good the loss. (*q*)

RESTORATION of the DEPOSIT.—*Liabilities of STAKEHOLDERS.*—If the deposit has been made by two persons jointly, it cannot be revoked, and the thing deposited be demanded back by one of them alone. If a valid and binding contract is made between *A.* and *B.* for the performance of some act or duty by *B.* by an appointed day, or within a reasonable time after the making of the contract, and for the payment of money by *A.* to *B.* on the act being done, and the sum to be paid is, by the mutual agreement of the parties, deposited by *A.* in the hands of *C.* to be paid over to *B.* on the performance of his contract, and in default to be returned to *A.*, the deposit cannot be revoked, and the money be demanded back from the stakeholder by *A.* without the consent of *B.*, (*r*) unless the transaction is illegal. (*s*) As soon as the stakeholder has received the deposit, he is bound to hold it to abide the event, and must not pay it over to either party until the condition upon which it was made payable or returnable has been accomplished. Thus, where an auctioneer has received a deposit from the purchaser of an estate to be paid over to the

(*p*) Post. s. 3. (COMMODATUM.) Dig. lib. 12, tit. 1, 4. Ulpianus, lib. 34, ad Sabinum. Inst. lib. 3, tit. 15, § 2.

(*q*) *Robinson v. Ward*, R. & M. 276. *Wren v. Kirton*, 11 Ves. 377. *Rocke v. Hart*, ib. 61.

Massey v. Banner, 4 Mad. 418, 419; 1 Jac. & Walk. 241, s. c.

(*r*) *Marryatt v. Broderick*, 2 M. & W. 372.

(*s*) Ante, 235, 236. *Elham v. Kingman*, 1 B. & Ald. 682.

vendor, if a good title to the property is made out by the latter, and in default thereof to be returned to the intended purchaser, the latter has no right to demand back the deposit, and the auctioneer is not justified in returning it without the consent of the vendor. But if the latter is not able to establish his title, or the contract is rescinded or abandoned by the mutual consent of the contracting parties, the auctioneer then holds the deposit for the use, and at the disposal of the party from whom he received it, and is bound to return it on the request of the latter. (1) So long as the contract between the parties interested in the deposit remains open, and the event is undetermined, the right to the deposit remains in suspension, and each of the parties have an equal interest in the due fulfilment of the trust by the stakeholder. If the event, when it does transpire, is not of a decisive character, and both parties set up a title to the deposit, the depositary must compel them to interplead, and so establish the right. This was formerly done through the medium of a bill in equity, called a bill of interpleader, setting forth the position of the depositary, the adverse claims to the deposit, and praying that the claimants might interplead, so that the court might judge to whom the deposit belonged, and the depositary be indemnified. But the stat. 1 & 2 Wm. 4, c. 58, now enables all depositaries or stakeholders who are sued in the superior courts or the courts of pleas of Lancaster or Durham for the recovery of deposits held by them (there being at the time other claimants thereto besides the plaintiff in such action) to apply to the court (such application being made after declaration and before plea) by affidavit or otherwise, showing that such defendant does not claim any interest in the subject matter of the suit, but that the right thereto is claimed or is supposed to belong to some third party who has sued or is expected to sue for the same, and that such defendant does not collude with such third party, but is ready to bring the amount into court or dispose thereof as the court or any judge thereof may direct; and the statute then authorizes the court or any judge thereof, after such application has been made, to make a rule or order calling upon such third party to appear and state the nature and particulars of his claim and maintain or relinquish it; and to hear the allegations of such third party, and of the plaintiff in the action, and in the mean time to stay the proceedings in the action, and finally to order such third party to make himself defendant in the same or some other action, and generally to dispose of the

(1) *Burrough v. Skinner*, 5 Barr. 2639. *Edwards v. Hodding*, 5 Taunt. 820. *Gray v. Gutteridge*, 1 M. & R. 614. *Duncan v. Cope*, 2 M. & W. 246.

merits of the claims, and determine the same in a summary manner, and make such rules and orders therein as to costs, and all other matters as may appear to be just and reasonable. (u)

In the Roman law, when disputes arose as to the ownership of the subject matter of the deposit, the depositary became a judicial depositary or sequestrator, and was bound to wait the decision of the controversy before he delivered up the deposit. If an action was brought against him by any one or more of the claimants, he might bring the deposit into court, and be there judicially discharged of his trust; the judge taking upon himself the duty of settling and deciding the conflicting claims. (x) When the deposit was made in the first instance by several persons jointly, each claiming adverse or different interests, it was denominated a sequestration, and the depositary was bound to keep the chattel in his own hands until it was adjudged who had the right, and then to deliver it up according to the adjudication. But if there was one depositor, or if the depositaries however numerous set up no adverse claims, but concurred in a joint demand, then the deposit was a simple deposit, and the depositary was bound to return the chattel as soon as he received a requisition to that effect. (y) "While a thing is under sequestration," observes Domat, "each of the persons who have deposited it is considered capable of being declared the owner of it. And this gives them all, and every one of them in particular, a right to see that the sequestrator carefully performs his trust. The possession of the right owner remains in suspense, for it cannot be said that any one of the pretenders possesses the thing, since, on the contrary, they are all of them divested of the possession. But because the sequestrator possesses the thing only in order to preserve it to the person who shall be declared to be the true owner, this possession, after the controversy is ended, will be considered, with respect to the owner, as if he himself had always possessed it, so as to establish a title by prescription." (z)

The stat. 8 & 9 Vict., c. 109, s. 18, which makes all wagers or "contracts or agreements, by way of gaming or wagering," null and void, (ante, 169,) and which provides that no suit shall be maintained in any court of law or equity for the recovery of any sum of money or valuable thing deposited in the hands of any person to abide the event on which any wager shall have been made; does not apply (s. 18) "to any subscription, or contribution, or agreement to subscribe or contribute for

(u) Chitt. Arch. Pr. (INTERPLEADER).

(x) Dig. lib. 16, tit. 3, lex 1, § 36, 44, lex 14.

(y) Dig. lib. 16, tit. 3, lex 17.

(z) Domat, (du dépôt et du séquestre,) s. 4, § 2, 4; Dig. lib. 16, tit. 3, lex 17, 31.

or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

When there are no adverse claimants, the depositary is bound to return the deposit on demand, and if he neglects to do so, he is responsible for the subsequent loss or destruction of the article, and for all injuries that may afterwards happen to it, by whatever means occasioned. (a) He must restore it, moreover, with all its increase and profits. Thus, he who has taken charge of a flock of sheep must restore the wool shorn from their backs and the lambs they have produced, together with the sheep themselves; and if the profits, produce, and increase are of a perishable nature, such as milk, eggs, and butter, and have been necessarily sold, the produce of the sale must, as previously mentioned, be paid to the depositor. (b) The depositary, moreover, cannot be called upon to deliver up the accessory without the principal. If the depositor turns out to be a thief and to have stolen the things deposited, and the true owner appears, the depositary must restore them to the latter. (c)

Liabilities resulting from the taking possession of goods by finding.—

A man may clothe himself with the ordinary obligations and liabilities of a depositary by finding and taking possession of the lost property of another as well as by receiving property direct from the hands of the owner. In Noy's Maxims, it is observed, (ch. 43,) "If one man finds goods of another, and they be hurt or lost by the negligence of him who found them, he shall be liable to make them good to the owner." (d) So in Doctor and Student, it is said, "If one man finds goods of another, and they be after hurt or lost by wilful negligence, he shall be charged to the owner. But if they be lost by other casualty, as if they be laid in a house that by chance is burned, or if he deliver them to another to keep that runneth away with them, I think he be discharged." (e)

"When a man doth find goods," further observes Lord Coke, "it hath been said and so commonly held, that if he doth dispossess himself of them, by this he shall be discharged, but this is not so; (f) for he who finds goods is bound to answer for them to him who hath the property, and if he deliver them over to any one, unless it be unto the right owner, he shall be charged for them, for at the first it is in his election whether he will take them or not into his custody, but when he hath them he

(a) Dig. lib. 16, tit. 3, 12, § 3; also 1 § 22, 45, 46.

(b) Dig. lib. 16, tit. 3, lex 1, § 23, 24, 38, 10. *Rocke v. Hart*, 11 Ves. 60.

(c) Domat, (du dépôt,) s. 1, § 5.

(d) Noy, ch. 43.

(e) Doct. & Stud. Dial. 2, ch. 38. Story's Bail. 64, 65.

(f) 12 Ed. 4, f. 13.

ought to keep them safely. . . . An action on the case lieth against him for his ill and negligent keeping." (g) So by the civil law, if the finder of a lost article took the thing lost into his possession, he was obliged to take care of it and preserve it for the owner. He was deemed, moreover, to be guilty of a theft if he made no attempt to discover the owner and restore the lost property, or if, knowing the owner, he kept the property without any intention to restore it. (h)

Implied engagements and liabilities of the DEPOSITOR.—The depositor is by the Roman law bound to reimburse the bailee all extraordinary expenses incurred by him in the preservation of the thing committed to his keeping, and such a liability may, under certain circumstances, exist in our own law, (ante, 756, 757.) The French law, moreover, concedes to the depositary a right to detain the chattel until he has received payment of such expenses ; (i) but no such right exists in the common law, and no depositary is ever permitted in this country to set up a right of lien upon the chattel for the mere expenses he has incurred in keeping and preserving it, (post, s. 2, 848.)

SECTION II.

OF A MANDATE OR GRATUITOUS COMMISSION.

If the bailee or depositary expressly or impliedly undertakes for something more than the mere passive custody of the thing bailed, the bailment advances from a mere naked deposit or simple bailment to a man-

(g) Coke, C. J., *Isack v. Clark*, 2 Bulst. 312.

(h) 1 Dig. lib. 47, tit. 2, lex 43, § 4. "Thou shalt not see thy brother's ox or his sheep go astray and hide thyself from them; thou shalt in any case bring them again to thy brother. And if thy brother be not nigh unto thee, or if thou know him not, then thou shalt bring it unto thine own house, and it shall be with thee until thy brother seek after it, and thou shalt

restore it to him again. In like manner shalt thou do with his ass; and so shalt thou do with his raiment; and with all lost things of thy brother's, which he hath lost and thou hast found, shalt thou do likewise." Deuteronomy xxii. 1, 2, 3. As to the finder's right to compensation, see ante, 756, 757.

(i) Pothier, (*DEPOT*,) No. 59; (*OBLIGATIONS*,) No. 625, Cod. civ. art. 1948.

date, or, as it is termed by the civilians, *MANDATUM*, and the bailee becomes clothed with the duties and implied engagements of a mandatary, in addition to those of a mere depositary for keeping. If money is bailed to a man upon the faith of a promise made by him to take and deliver it to a banker, or to invest it in the public funds, or lay it out in the purchase of lands, this is an express mandate. An implied mandate arises when the bailee takes charge of living animals or perishable chattels for whose preservation and safe keeping a certain amount of work and labour, attention and skill is necessarily requisite, and which the bailee, by accepting the trust and duty, impliedly undertakes to furnish. It is essential to the existence of a mandate that it be gratuitous, for if anything is to be paid for what is expressly or impliedly agreed to be done, the contract immediately becomes a contract for the hire of labour and skill to be performed and exercised upon the thing bailed (*a*)

The term *MANDATUM* or *MANDATE* was applied in the Roman law to all gratuitous agencies and procurations, whether made concerning land or realty or chattels, and whether accompanied or unaccompanied by any transfer or delivery of property. Whenever one man asked another to do something for him gratuitously, and the other assented to the request and undertook the task, the transaction was, by the civilians, termed a *mandatum* or *mandate*. (*b*) In the common law, the term is generally restricted to express or implied promises made on bailments of chattels that something shall be done with them gratuitously for the benefit of the bailor. The bailor who makes the request and gives the directions as to the disposal of the chattel is called the mandator, and the bailee who receives the chattel upon the terms expressed or implied, and assents to the directions and undertakes the trust to be performed is called the mandatary. So long as there has been no actual bailment by the delivery and acceptance of the chattel, there is no binding contract of mandate. A promise to do something with a thing that has never been put into the actual or constructive possession of the promisor is a mere *nudum pactum* which may be revoked; but when the bailment has been made upon the faith of the promise, and the promisor has obtained possession of the chattel in execution of the mandate, the contract is complete, and he is bound faithfully to discharge the trust he has undertaken. (*c*)

It has been said, in reference to gratuitous undertakings to perform

(*a*) In summa sciendum est, *mandatum* nihil gratuitum sit in aliam formam negotii cadere; nam mercede constituta, incipit locatio et conductio esse. Instit. lib. 3, tit. 27, § 13.

(*b*) Instit. lib. 3, tit. 27.

(*c*) *Wheatley v. Low*, Cro. Jac. 668. *Whitehead v. Greenham*, 10 Moore, 193, 194. *Bainbridge v. Firmston*, 1 P. & D. 2. *Perry v. Roberts*, 3 Ad. & E. 118.

work, that if the promisor does not proceed on the work, no action will lie against him for the *non-feazance*; but "if he *proceeds on the employment*, he makes himself liable for any *misfeazance* in the course of that work." (d) But when a man promises to perform work upon, or to do something with, the chattel of another, and the chattel is bailed to him for the purpose expressed, his acceptance of the possession of the chattel in execution of his engagement is an "entering on the work and employment," and if, after having accepted such possession, and taken the chattel away with him, he neglects to do that which he promised to perform, this neglect is a *misfeazance* for which he shall be responsible. The common law leaves him to act, or not to act, after he has made the promise, as he may think fit; he may, therefore, refuse to accept the chattel when it is tendered to him, and no action can be brought against him for so doing. But if he takes it and carries it away, he then acts, he has commenced the work, and is responsible for any subsequent *misfeazance*. He may indeed revoke his promise and return the chattel, if he does it without delay, and before his acceptance of the trust and omission to fulfil it has occasioned loss or damage to the mandator, but he cannot, if the revocation will place the latter in a worse position than he was in at the time the mandate was accepted, and the promise made, lawfully withdraw such promise, and refuse to execute the trust. "Every man is at liberty," it is observed in the Institutes, "to refuse a mandate, but when once accepted and undertaken, it must be performed or renounced as soon as possible, that the mandator may transact the business himself or through another. For unless it is renounced so that the mandator has the same opportunity of getting the business done that he possessed at the time of the acceptance, an action will lie against the mandatary, unless indeed some just cause for the non-renunciation or the delay in making it shall have intervened." (e)

As to the objection that there is no consideration to ground the action upon, the difference is, as it has been observed, between being obliged to do the thing when there is no bailment, and answering for things which the bailee has taken into his custody upon such an undertaking. An action indeed will not lie for not doing the thing in the one case for want of a sufficient consideration; but yet if the bailee will take the goods into his custody, he shall be answerable; for the taking the goods into his custody

(d) Ashurst, J., *Elles v. Gatward*, 5 T. R. 149; Holt, C. J., 2 Raym. 919, 920.

(e) Mandatum non suscipere cuilibet liberum est; susceptum autem consummandum est, aut

quam primum renuntiandum, ut per semetipsum, aut per alium, eandem rem mandator exequatur. Instit. lib. 3, tit. 27, § 11. *Elles v. Gatward*, 5 T. R. 149.

is his own act. "And the action is founded upon the promise upon which I have been contented to trust you with the goods which without such promise I would not have done." (f) "A bare being trusted," observes Holt, C. J., "with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust and take the goods into his possession."

If a man, for example, undertakes to do something with some document or security of value, and the thing is bailed to him upon the faith of this undertaking, and he takes it away, leaving the mandator to suppose that he will execute the commission intrusted to him, and neglects so to do, he is responsible for the damage that may be sustained by the mandator by reason of his neglect, although he was to receive no pecuniary consideration for his trouble, and derive no benefit from the transaction. (g) Thus, where a sum of money was bailed to a banker upon the faith of an undertaking made by him to cause the sum to be paid to the bailor or his order at a distant period, it was held that the bailment of the money was a sufficient consideration for the undertaking, and that the banker was responsible for the non-fulfilment of his engagement. (h) So where certain iron boilers were delivered to a man upon the faith of an undertaking made by him to weigh them gratuitously and return them to the bailor in as perfect and complete condition as they were in at the time of the making of the bailment, and the mandatary took the boilers to pieces in order to weigh them, but refused to put them together again; it was held that he was responsible for his breach of contract, and must make good the damage that had been sustained by the mandator. (i)

LIABILITIES *and* IMPLIED ENGAGEMENTS *of the* MANDATARY.

As regards the mere custody of the thing bailed to him, the mandatary stands in the position and is clothed only with the ordinary liabilities of a naked depositary. (k) The nature and extent of his liability in respect of the fulfilment of the commission which he has either expressly or impliedly undertaken to execute, is naturally regulated by the nature of the subject matter of the bailment, the nature of the duty and employment itself, and the presumed skill and capacity of the bailee, as well as by the express terms of the mandate.

(f) Powell, J., *Coggs v. Bernard*, 2 Raym. 912. *Brown v. Dizon*, 1 T. R. 274.

(g) *Wilkinson v. Coverdale*, 1 Esp. 75. *Wallace v. Polfair*, cited ib. 76.

(h) *Shillbeer v. Glyn*, 2 M. & W. 143.

See also *Perry v. Roberts*, 3 Ad. & E. 118.

(i) *Bainbridge v. Firmston*, 1 P. & D. 2.

(k) Ante, 831—835. *Hutton v. Osborne*, Selw. N. P. 399, n. (b.)

BAILMENTS of CHATTELS to be CARRIED from place to place gratuitously.—A bailee who has undertaken gratuitously to convey goods from one place to another, and has entered upon the trust, is bound to exercise the same care and diligence in the execution of the task as a person of ordinary care and prudence might be expected to exercise in the conveyance of his own property. If by negligence and mismanagement in the accomplishment of his undertaking the goods are lost, injured, or spoiled, he will be responsible for the loss. Thus, where a man undertook to remove several hogsheads of brandy from one cellar to another, and there lay them down safely, and in the course of the removal one of the casks was staved and the brandy spilt through negligence and want of care, it was held that he was responsible for the loss, although it did not appear that he was to have anything for his pains. "It is objected," observes Holt, C. J., in his celebrated judgment in this case, "that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that the owners trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed, if the agreement had been executory to carry these brandies from one place to the other on such a day, the defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this signifies an actual entry upon the thing and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing." (1)

When a bailee has undertaken to carry goods and chattels gratuitously to a distant part, it is no answer to an action brought against him for the breach of his engagement to say that he lost the articles by the way-side without giving any account of the loss. The loss itself unexplained affords a strong presumption of negligence, (m) and the mandatory ought to rebut this presumption by showing that he was robbed, or that his vehicle broke down or was overturned, and that the articles were lost during the hurry and confusion and fright of an undoubted accident. Thus, where the bailee of a parcel upon which the word "value" was written promised to carry it gratuitously from Bedford to London, and directions were given to him to take particular care of it upon the road, and deliver it to the book-keeper at the Bell and Crown, Holborn, and the parcel not being delivered, an action was brought against the mandatory

(1) *Coggs v. Bernard*, 2 Raym. 919.

(m) *Doorman v. Jenkins*, 2 Ad. & E. 256.

Parry v. Roberts, 3 Ad. & E. 120; 5 N. & M. 670.

for the breach of his engagement, and no evidence was offered by him to excuse or account for his neglect. Lord Tenterden left it to the jury to say whether there had not been great negligence on his part, and the jury thinking that there had, found a verdict for the plaintiff. (n)

If the circumstances attendant upon an alleged loss by robbery are of a suspicious character tending to throw a doubt upon the good faith of the mandatary, a jury will naturally disbelieve the robbery, and treat the loss as totally unaccounted for and unexplained.

The captain of a vessel was intrusted with a seaman's chest to be carried gratuitously from Trinidad to England, and during the voyage the chest was opened to see if it contained any contraband articles, and was found to be filled with money and valuables, which were taken out by order of the captain, put into a canvass bag, and deposited in the captain's own chest in his cabin where his own money and valuables were kept. On the arrival of the vessel at Gravesend, the captain and one of the mates went ashore, leaving the vessel in charge of the other mate, and the next morning the captain's chest was missing, and was never afterwards discovered. It further appeared that the night preceding the loss an excise officer and two young men belonging to the ship had been allowed to sleep in the captain's cabin, and Lord Ellenborough left it to the jury to say whether the captain had been guilty of negligence, telling them that as soon as he had discovered the valuable nature of the property, he was bound to watch it with great care and diligence, and the jury being of the opinion that proper care had not been taken of the money, found a verdict for the plaintiff for the full value of the property. (o)

BAILMENTS of chattels to be MENDED or REPAIRED gratuitously.—If a chattel is bailed to a workman or artificer in some particular art, craft, or profession, upon the faith of an undertaking made by the bailee to mend, repair, or improve it gratuitously for the benefit of the mandator, the mandatary must complete the work within a reasonable period, and must be especially mindful that the article is not injured in his hands during the performance of the work through a want of that knowledge and skill which every workman and artificer in a particular art or craft is bound to possess. The situation and profession of the artisan in such a case naturally imply that he is possessed of competent skill, and he is responsible for injuries resulting from his neglect to use it, whether he is or is not to be paid for his labour and pains. (p) The foundation of

(n) *Beauchamp v. Powley*, 1 M. & Rob. 38.

(o) *Nelson v. Mackintosh*, 1 Stark. N. P. C. 163.

(p) *Shiells v. Blackburne*, 1 H. Bl. 162.

this increased liability is the increased confidence reposed in him inducing the mandator to trust him with the chattel when he would not have trusted an unskilful person.

But if a person, known to be unskilled in the particular work or employment he gratuitously undertakes, does the work, at the solicitation of a friend, with such ability as he possesses, he stands excused, although it is unskilfully done; for it is the mandator's own folly to trust him, and the party engages for no more than a reasonable exertion of his capacity. Thus, where a mandatory undertook to get some articles that had been bailed to him entered at the Custom House, and gave by mistake a wrong description, but appeared to have acted *bona fide* and to the best of his ability, it was held that he was not responsible for a seizure of the goods by the Custom House officers. "Had the situation or profession of the bailee," observes Lord Loughborough, "been such as to imply skill, an omission of that skill would have been imputable to him as gross negligence. If, in this case, a shipbroker or a clerk in the Custom House had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries." (q)

The mandatory is, in respect of the custody and safe keeping of the chattel, clothed with the ordinary liabilities and responsibilities of a naked depositary.

BAILMENT of money for INVESTMENT.—If money is bailed to a man upon the faith of a promise or assurance made by him to place it out at interest, or purchase an annuity with it for the benefit of the bailor, the mandatory who accepts the money and enters upon the execution of the trust impliedly promises to use due and sufficient care in the fulfilment of his undertaking, and if the money is lost by his miscarriage and neglect to exercise common and ordinary care in the selection of a safe investment, an action will lie against him for the loss. (r) But the mandatory is not responsible (if he does not exercise any trade or profession denoting that he has skill in money matters and has more than ordinary knowledge of investments and securities for money,) for the exercise of more than ordinary care and caution, and he is not liable for the failure of the investment if he has used such skill and knowledge as he possessed, and has acted with uprightness and honesty of purpose in the transaction of the business confided to him. "The only duty that is imposed upon him under such a retainer and employment is a duty to

(q) *Shiells v. Blackburne*, 1 H. Bl. 159.
Moore v. Mourgue, 2 Cowp. 479.

(r) *Coggs v. Bernard*, 2 Baym. 910. *Whitehead v. Gresham*, 10 Moore, 195.

act faithfully and honestly, and not to be guilty of any gross or corrupt neglect in the discharge of that which he undertakes to do. A man may, when acting most faithfully and most honestly, happen to take an insufficient security without gross or culpable negligence on his part, he may have been misled, he may have been deceived, he may have taken such care as an ordinary man would take with regard to the subject matter intrusted to him, and yet doing all that, his endeavours may have failed, and it may so happen the security may, without his knowledge and against his will, have turned out to be insufficient." (s) "Whoever," observes Dr. Paley, "undertakes another man's business, makes it his own, that is, promises to employ upon it the same care, attention, and diligence that he would do if actually his own; for he knows that the business was committed to him with that expectation. And he promises no more than this." (t)

If a sum of money is entrusted to a man to be transmitted to some distant part, or to be laid out by him in some purchase or investment for the benefit of the mandator, and with an express or implied authority or permission to use the money himself, until the purpose for which it was bailed can be accomplished; and the mandatary accordingly spends the money with the intention of replacing it when necessary, with other money, or pays it in to his bankers to his own account, and not to the separate account of the mandator, the bailment of the money becomes a loan for use and consumption, and the bailee is clothed with the duties and liabilities, and implied engagements of a borrower, by way of mutuum, in addition to those of a mandatary, (post, s. 8.) In ordinary cases of the deposit of money with bankers, the transaction amounts to a mutuum, or gratuitous loan for use and consumption, the banker being invested with an implied authority to use the money until the purposes of the bailment have been accomplished. In these cases the money is payable, as we shall presently see, absolutely and at all events, and the bailee cannot excuse himself from the obligation to repay the amount, by showing a loss by robbery, or from inevitable accident. (u)

Bailments of LIVING ANIMALS.—If the subject matter of the bailment consists of living animals, such as horses, oxen, cattle, or sheep, the mandatary is bound to furnish them with suitable food and nourishment, (x) to give them a proper and reasonable amount of exercise and fresh air,

(s) *Dartnall v. Howard*, 4 B. & C. 350, 351.

(t) Paley's Moral Philos. B. 3, P. 1, ch. 12. Puff. lib. 5, c. 4, s. 2.

(u) *Shilkbeer v. Glynn*, 2 M. & W. 148, post,

855.

(x) Si un cheval soit bail a un homme a garder et apres il ne lui done sustenance p. q. il morust action sur le cas gist. Hil. Term, 2 Hen. 7, 9, B.

and generally to provide them with all such things as are essential to the preservation of their health, and his neglect so to do will amount to a positive fraud and breach of trust. If a man takes charge of cattle or sheep, and afterwards takes no heed of them, but lets them stray away on a common, and get drowned or lost, this is a breach of trust, and he is responsible for the loss. (y) If he turns a horse, of which he has consented gratuitously to take charge, into a dangerous pasture after dark, and the horse falls into a pit or a well, or into the shaft of a mine, this is a gross neglect and breach of trust, and he shall be responsible for the loss. (z) If he places a horse in a pasture surrounded by rotten and very defective fences, and the horse, by reason thereof, strays away and is lost, this also is a breach of trust, for which he shall be answerable; but if the horse was a wild ungovernable animal, and got away through its own recklessness and impatience of restraint, as much as by reason of the defective fences, then the bailee will not be responsible for the loss (a)

What is, and what is not gross negligence, amounting to a breach of trust, is often a mixed question of law and fact, but more generally a pure question of fact, to be determined by a jury. It must be judged of by the actual state of society, the general usages of life, and the dangers peculiar to the times, as well as by the apparent nature and value of the subject matter of the bailment, and the degree of care it seems to require. It has been justly observed by J. Story, that it is impossible to lay down an exact rule applicable to all times and all circumstances, for the same acts which in one country or in one age may be deemed negligent acts, may at another time or in another country be justly deemed an exercise of ordinary diligence. "Thus in times of primitive or pastoral simplicity, when it is customary to leave flocks to roam at large by night, it would not be a want of ordinary diligence to allow a neighbour's flock which is deposited with us to roam in the same manner. But if the general custom was, at night, to pen them in a fold, it would doubtless be a want of such diligence not to do the same. "In many parts," he observes, "of our country, especially in the interior, where there are, comparatively speaking, few temptations to theft, it is quite usual to leave barns, in which horses and other cattle are kept, without being locked by night. But in cities, where the danger is much greater, and the temptations more pressing, it would be deemed a great want of caution to do the same." (b)

(y) Hil. Term, 2 Hen. 7, 9 B. *Coggs v. Bernard*, 2 Raym. 913.
 (z) *Rooth v. Wilson*, 1 B. & Ald. 61, 62.

(a) Domat, Depot. s. 3, 6.
 (b) Story on Bailments, 9, 10.

A mandatary who undertakes an office of skill, is bound to exercise such an amount of skill as he actually possesses, or such an amount of skill as by his conduct and actions, and ordinary course of employment, he holds himself out to the world to possess. Thus where a man proved to be conversant with, and skilled in horses, was commissioned to ride a horse to a neighbouring village, for the purpose of showing it for sale, and on his arrival he rode the horse into the race-ground, which was wet and slippery, and the horse slipped and fell several times, and at last in falling broke one of its knees, it was held that the bailee had been guilty of a culpable neglect and breach of trust, and was answerable for the damage. (c) If a farrier or a surgeon undertakes to treat a living animal or a patient for some disorder gratuitously, he is nevertheless bound to exercise the ordinary knowledge and skill of his art or profession in the course of his treatment, and will be responsible for injuries resulting from his neglect so to do. (d)

BAILMENTS of PERISHABLE COMMODITIES.—If the subject matter of the bailment is a perishable commodity, the bailee is bound to bestow such an amount of labour and pains and vigilance for its preservation as would ordinarily be bestowed by a prudent owner. If the mandatary of a valuable painting, for example, takes no heed for its preservation, but lets it lie on the damp ground, or places it in a kitchen, or against a damp wall in a room where there is no fire, when he might have placed it in a dry situation and in perfect security, this is an act of gross negligence; and if the picture is seriously injured, or totally destroyed from damp or dirt, he must make good the loss, unless he can show that the mandator knew where it was placed, and assented to its being there kept. (e)

A mandatary has no right to make use of the subject matter of the bailment for his own gain and advantage; if he does so, and it is lost, or in any way injured or deteriorated in value by reason of the user, he must, in common with a depositary, make good the loss. The moderate exercise of a horse or a hound, or a living animal, is necessary for its health and safe preservation, and is consequently a user for the benefit not of the mandatary, but of the owner. The same may be said of the milking of a milch cow, or the shearing of sheep, provided the produce is appropriated to the use of the owner. A mandatary who has charge of a milch cow or of sheep, is bound indeed to milk the cow and shear the sheep, and account for the produce to the mandator; if he sells the milk or the wool, and refuses to pay over the money, this is a conversion of it to his own

(c) *Wilson v. Brett*, 11 M. & W. 113.

Bl. 162.

(d) *Heath, J., Shiells v. Blackburne*, 1 H.

(e) *Mytton v. Cock*, 2 Str. 1099.

use, and a breach of trust, for which he shall be held responsible. If the bailment is made under circumstances leading to the conclusion that the bailee was to have the use of the thing in return for his labour and pains in the keeping of it, as if he were to have the milk of the cow, the wool of the sheep, or the young of animals bearing increase, for his own benefit and advantage, then the bailment would amount to a contract of borrowing and lending, and not to a mandate.

Liability of the MANDATOR.—Payment of the expenses.—By the Roman law the mandator is bound to reimburse the mandatary all expenses that he has necessarily and unavoidably incurred in the safe keeping and preservation of a chattel intrusted to his care and management. If he took charge of living animals, he had a right to call upon the mandator for the expenses of their keep and nourishment. If he was obliged to incur expense in procuring carriages or means of transport for the conveyance of inanimate things intrusted to him to be conveyed to a distant part, or otherwise in and about the execution of his trust, the mandatary was bound to reimburse him such expenses, for it was considered that a gratuitous commission executed for the behoof of the mandator ought not to be made a subject of expense and charge to the mandatary. (f) In the common law, if the mandatary must necessarily incur expense in the execution of the commission intrusted to him, he is clothed with an implied authority from the mandator to defray such expenses, and all money necessarily laid out by him in that behalf, is money expended for the use of the mandator at his (implied) request for the recovery whereof the ordinary action for money paid (ante, 226—231) is maintainable by the mandatary. "Thus, if a party requests a friend to receive his goods and enter them at the custom-house and pay the duties thereon, an implied obligation arises to reimburse the amount of duties and other incidental expenses and charges upon the entry. If a party requests a friend to carry goods for him in a stage coach to another town, for which goods carriage hire is usually paid, a like duty to pay the bill is presumed." (g)

The French law accords to the mandatary a right to detain the chattel until he has received payment of the expenses he has incurred in the execution of the trust concerning it. In our own law no such right exists, and no lien is permitted to be claimed by one man upon the property of another for the expenses attendant upon the execution of a gratuitous commission. (h) A person, therefore, who receives horses, cows, sheep, or

(f) Dig. lib. 16, tit. 3, l. 12, l. 23; Domat, lib. 1, tit. 15, s. 2, § 6.

(g) Story's Bailments, § 197.

(h) *Sanderson v. Bell*, 2 Cr. & M. 391; 4 Tyr. 244, s. c.

any description of living animals to keep for the owner, has no lien upon them for the expenses of their keep, or for the repayment of money disbursed by him in providing them with proper food and nourishment,⁽¹⁾ or for sending persons to seek after them when they have gone astray, or for the hire of servants to watch and tend them.

SECTION III.

OF A COMMODATUM AND MUTUUM OR GRATUITOUS LOAN.

If the bailee is to have the use and enjoyment of the subject matter of the bailment for his own benefit and advantage, without payment of hire or reward to the bailor, then the bailment becomes a gratuitous loan, and the bailee is clothed with the duties and responsibilities and implied engagements of a borrower for use in addition to those of a mere depositary and mandatary. There are in the civil law two kinds of gratuitous loans, the one called a *mutuum*, which is a loan for use and consumption, the thing being bailed to be consumed and an equivalent in kind subsequently returned; and the other a *commodatum*, which is a loan of a specific chattel to be used by the bailee and returned *in individuo*. In the loan by way of *mutuum* the bailor is called the creditor by reason of the credit given by him to the promise of the bailee, and the latter the debtor because he owes an equivalent to be paid back. (a) In the loan, by way of *commodatum*, the parties are known in law by the ordinary appellation of borrower and lender.

"The Latin language," observes Gibbon, "very happily expresses the fundamental difference between the *COMMODATUM* and the *MUTUUM* which our poverty is reduced to confound under the vague and common appellation of a loan. In the former the borrower was obliged to restore the same individual thing with which he had been accommodated for the temporary

(1) *Chapman v. Allen*, Cro. Car. 271. *Jackson v. Cummins*, 5 M. & W. 342. *Judson v. Etheridge*, 1 Cr. & M. 746.

(a) Dig. lib. 50, tit. 16, lex 11; lib. 12, tit. 1, lex 2, § 3. *Mutui datio* consistit in his rebus quæ pondere, numero, mensurâ, consistunt; quo-

niam eorum datione possumus in creditum ire: quia in genere suo functionem recipiunt per solutionem, quam specie, nam in cæteris rebus ideo in creditum ire non possumus, quia, aliud pro alio, invito creditori, solvi non possunt. Dig. lib. 12, tit. 1, lex 2, § 1.

supply of his wants ; in the latter it was destined for his use and consumption, and he discharged this *mutual* engagement by substituting the same specific value according to a just estimation of number of weight and of measure." (b) If corn or potatoes, wine or brandy, coals or oil, be borrowed, they are borrowed to be consumed, the corn being eaten, the wine drunk, and the coals and the oil burned and consumed ; a loan of this description, therefore, is necessarily a *MUTUUM*, for the identical thing lent cannot be returned, but an equivalent in kind must be rendered back. (c) If money is lent to be used, the money is necessarily mixed with other coin of a similar denomination, it passes into other hands ; its identity and individuality are destroyed, and the specific pieces of coin cannot be rendered back. A loan of money, therefore, is a *mutuum*, the borrower being bound to restore, not the identical money lent, but an equivalent in the shape of money of the same denomination and value. (d)

But if a horse or a book be lent for use, the identity and individuality of the chattel are not destroyed or in any way affected by the use ; the same horse and the same book remain, though the one may have been ridden, and the other read, the loan, therefore, is a *COMMODATUM* ; the borrower does not fulfil his engagement by rendering an equivalent in the shape of a different horse or a different book of equal value, but is bound to return the identical thing lent. (e) It is of the very essence of a *commodatum* that the subject matter of the bailment be granted to be used free of reward, for if anything be paid for the use of the chattel, the contract is a contract of letting and hiring, and belongs to the class *LOCATIO REI*. (f)

LIABILITIES of the BORROWER.—In a bailment by way of *mutuum*, the chattel bailed becomes the absolute property of the bailee to do what he pleases with it, and use it in any way that he thinks fit ; (g) but in a bailment by way of *commodatum*, the temporary right of possession and user only are transferred, the right of property remaining in the lender, (h) and the borrower, consequently, is obliged to render back the identical thing lent in as good condition as it was in when borrowed, subject only to the deterioration re-

(b) Gibbon's Roman Empire, ch. 44, § 2.

(c) Non potest commodari id quod usu consumitur. Dig. lib. 13, tit. 6, § 6.

(d) Et quoniam nobis non eodem res, sed alie ejusdem nature et qualitat, redduntur inde etiam mutuum appellatum est, quia ita a me tibi datur, ut ex meo, tuum fiat. Instit. lib. 3, tit. 15. Ieo baila a un argent, ou blées hors de bagge ou sack a garder et a rebailer a moi, quant il sera requis, ieo ne puisse le prouer estre mon blée ou mon argent, car quant il est hors de bagge ou sacke, it ne peut etre discerne, ne un denier ni blée conus d'auter. *Stawford's Pleas*

del Coron, lib. 3, c. 23, p. 188, ed. 1583.

(e) Doct. and Studt. Dial. 2, ch. 38.

(f) Commodata autem res tunc proprio intelligitur, si nulla mercede accepta, vel constituta, res tibi utenda data est—*gratuitum* enim debet esse *COMMODATUM*. Instit. lib. 3, tit. 15, § 2 ; Dig. lib. 13, tit. 6.

(g) Appellata est autem mutui datio ab eo, quod de meo tuum fit ; et ideo si non fiat tuum non nascitur obligatio. Dig. lib. 12, tit. 1, § 2. Instit. lib. 3, tit. 15.

(h) Nemo enim commodando rem facit ejus cui commodat. Dig. lib. 9.

sulting from inherent defects or produced from ordinary wear and tear and the reasonable use of it for the purpose for which it was known to be required (*i*) The law exacts the strictest good faith from the borrower, and makes him responsible for the slightest breach of trust. "If a man should lend another a horse to go westward, and the bailee go northward, if any accident happen to the horse on the northern journey the bailee will be chargeable, because he has made use of the horse contrary to the trust he was lent to him under; and it may be if the horse had been used no otherwise than as he was lent, that accident would not have happened to him." (*k*)

If a horse is lent for the performance of an ordinary journey, and the borrower leaves the high road and travels unnecessarily through by-paths or dangerous roads, and the horse falls, and is injured, he will be responsible to the lender; but if the horse is lent for the purpose of hunting, then the borrower is justified in using it in by-paths and dangerous places, and may expose it to all the ordinary risks of the chase, because those risks are necessarily incident to the use for which the horse was borrowed, and were known to and must have been contemplated by the lender. So, to cite an instance from the Digest, if a man lends his horse to a neighbour to ride home, and the latter rides the horse to a fight, where it is injured, or killed, he shall make good the loss; but if it is lent to him for the express purpose of enabling him to join in the affray, then the lender must abide by all the ordinary risks of warfare, and if the horse is killed he has no claim for compensation against the borrower. (*l*) And if the lender, to cite another example from the Digest, lends a service of plate to the borrower for the purpose of entertaining a party of friends at supper, at his, the borrower's, own house, and the borrower transports the plate away from his house to some distant part, he will be responsible for this breach of faith, and for all the injuries that may befall the things lent, whether occasioned by fire, shipwreck, pirates, or any inevitable accident. (*m*)

By the Roman law, it is provided that if the borrower has knowingly and wilfully used a chattel lent to him for purposes not warranted by the nature of the loan, and not approved of by the lender, he shall be deemed

(*i*) *Handford v. Palmer*, 5 Moore, 76; 2 B. & B. 359.

(*k*) *Coggs v. Bernard*, 2 Raym. 915; Bract. lib. 3, ch. 2, § 1, p. 99, 100, who copies as usual the text of the Institutes.

(*l*) Si tibi equum commodavero, ut ad villam

adduceres, tu ad bellum duxeris, commodati te neberis. Plane si sic commodavi ut ad bellum duceres, meum erit periculum. Dig. lib. 13, tit. 6, lex 5, § 7.

(*m*) Dig. lib. 13, tit. 7, lex 18.

guilty of theft,⁽ⁿ⁾ and be liable to a penalty to the extent of double or quadruple the value of the thing lent, which may be recovered from him by the lender in an action of theft.

The measure of care and diligence to be exercised for the protection and preservation of a thing bailed by way of commodatum, whilst it remains in the possession of the borrower, is that amount of care, prudence, and foresight, which the most vigilant and careful of men exercise for the preservation and protection of their own property.^(o) The foundation for this increased liability, on the part of the BORROWER in comparison with the *hirer* of a chattel, is the increased trust and confidence reposed in him. The lender himself derives no benefit from the contract. In making the bailment he performs a gratuitous act of kindness dictated by his confidence in the bailee; the law therefore exacts from the latter a corresponding return, and requires from him the greatest amount of care that is ever bestowed by the most cautious of men in the protection and preservation of property of the description bailed. The borrower cannot, of course, be made responsible for inevitable accidents, or casualties which could not have been foreseen, and which no human prudence could have guarded against;^(p) but if by the exercise of proper forethought and care he might have saved the thing bailed to him from an accident which has occurred, and he has not done so, his own neglect is the occasion of such accident, and he is responsible therefor. The bailee, observes Lord Coke, will be answerable for the "*least neglect*." If he or his servant puts a borrowed horse into a stable and neglects to lock the door at night, and thieves come and steal the horse, he will be responsible for the loss, for the neglect to lock the door may have encouraged the thieves, and been the occasion of the robbery. If the borrower puts a borrowed horse into a ruinous building likely to fall, and the building is blown down during a tempest, and falls upon and kills the horse, the borrower shall be answerable, for if the building had been strong, and in good repair, perchance the disaster would not have occurred, and "it cannot, therefore, be taken as a chance but as the default of him that had the horse delivered to him. But if the house were strong, and of likelihood, and by

(n) Si is qui rem utendam accepit, in alium usum eam transferat, quam cujus gratia ei data est, furtum committit: veluti si quis argentum utendum acceperit, quasi amicos ad cenam invitaturus et id peregre secum tulerit; aut si quis equum gestandi causâ commodatum sibi longius aliquo duxerit: Instit. lib. 4, tit. 1, § 6.

(o) Exactissimam diligentiam custodiendæ rei præstare compellitur, nec sufficit ei eandem

diligentiam adhibere quam suis rebus adhibet; si alius diligentior custodire poterit. Dig. lib. 44, tit. 7, 1, § 4. Inst. lib. 3, tit. 15, § 2.

(p) Is, qui utendum accepit, si majore casu cui humana infirmitas resistere non potest, voluti, incendio, ruinâ, naufragio amiserit securus est. Dig. lib. 44, tit. 7, 1, § 4. Bract. lib. 3, ch. 2, p. 99.

common presumption in no danger of falling, but fell notwithstanding by sudden tempest, then it shall be taken as a chance, and he that had the keeping of the horse shall be discharged."(*q*)

If a horse is lent for an ordinary ride along the high road, and the borrower takes the horse off the high road and rides him into wet and slippery ground, and the horse slips and breaks his knees or is otherwise injured, the borrower must make good the loss. If the borrower is a person conversant with horses, he is bound to use such care and skill in the riding of the horse as a person conversant with horses may reasonably be expected to use. If, therefore, he throws the horse down and injures it by injudicious riding or unskilful horsemanship, he is answerable for the damage. (*r*) It has been said that every lender of a horse for riding impliedly bargains at the time he makes the loan for the exercise on the part of the borrower of competent skill in riding and the management of a horse, and that if the horse comes to any damage from the want of such skill, the borrower is responsible, as he ought to have considered his own capacity before taking upon himself the care and management of the animal, and must be considered at the time he sought for the loan to have impliedly represented himself to be skilled in riding. (*s*) But if the bailor chooses without making any previous inquiry to intrust a fiery and high-spirited horse to a stranger of whose skill in horsemanship he knows nothing, he has no right to expect the management and dexterity of an experienced rider. Neither if he lends valuable property to a notorious drunkard or a notoriously wild and reckless character, has he any right to expect the care and attention of a very vigilant and painstaking person. (*t*)

By the civil law, the borrower is responsible for all losses and injuries to the thing borrowed, occasioned by the private enmity of persons hostile to the hirer, if he has by some fault or misconduct on his part provoked that enmity. (*u*)

The loan of the use is strictly personal to the borrower, founded on the confidence reposed in him, and does not in general warrant a user by the servants of the latter. (*x*)

RESTORATION of things borrowed.—In the case of a loan by way of MUTUUM, the borrower is bound to restore, at a time agreed upon or

(*q*) Doctor and Student, Dial. 2, ch. 38.

(*r*) *Wilson v. Brett*, 11 M. & W. 115.

(*s*) *Jones's Bailments*, 65; 11 M. & W. 115.

(*t*) Pothier, *Pret à Usage*, ch. 2, § 2, art. 2,

No. 49; Bract. Lib. 3, tit. 2, § 1, 99, b.; ante, s. 1, 839.

(*u*) Dig. lib. 19, tit. 2, lex 27, § 4.

(*x*) *Brinsloe v. Morrice*, 1 Mod. 210; 3 Salk. 271.

within a reasonable period after request, an article of the same kind and quality as the one originally lent to him. He cannot of course return new wine for old, (y) coarse cloth for fine cloth. It is the essence of a *mutuum* that a chattel of the same character, description, and quality as the one lent should be given back; if, by the agreement of the parties, an article of a different character is to be returned, the contract is not a *mutuum*, but an exchange or sale. (z) All such things, say the civilians, as are ordinarily regulated by number, weight or measure, such as wine, corn, oil, money, brass, silver, or gold, may properly be made the subject of a *mutuum*, as they can readily be repaid in kind of the same quantity and same quality; but a horse, a greyhound, a fowling-piece, and all chattels whose value depends upon the intrinsic qualities of each in particular, and not upon the general attributes of the genus, cannot properly be made the subject of a *mutuum*, because although they are of the same kind, yet each one of the kind differs so much from another in quality and attributes, that the creditor cannot be compelled against his will to take one for another.

As the right of property in the thing bailed is transferred to the bailee by a bailment by way of *mutuum*, so also is the risk of loss. If, therefore, the bailee is robbed before he reaches home, or the thing bailed is destroyed by wreck, fire, or inevitable accident before it can be used, the bailee must, nevertheless, pay the equivalent which he owes to the bailor at the time appointed. (a) "If money, corn, wine, or any other such thing which cannot be re-delivered or occupied be borrowed and it perish, it is at the peril of the borrower. But if a horse, or a cart, or such other things as may be used and delivered again, be used according to the purpose for which they were lent, if they perish, he who owns them shall bear the loss, if they perish not through the default of him who borrowed them, or he who made a promise at the time of the delivery to re-deliver them safe again. If they be used in any other manner than according to the lending, in whatever manner they may perish, if it be not by default of the owner, he who borrowed them shall be charged with them in law and conscience." (b)

When the loan is made by way of *COMMODATUM*, the borrower must return

(y) Non licet debitori deteriores rem, quæ ex eodem genere sit reddere; veluti vinum novum pro veteri; id autem agi intelligitur ut ejusdem generis et eadem bonitate solvatur quæ datum sit. Dig. lib. 12, tit. 1, 3.

(z) Nam si aliud genus, veluti ut pro tritico vinum recipiamus, non erit *mutuum*. Dig. lib. 12, tit. 1, 2.

(a) Et is quidem qui *mutuum* accepit, si quolibet fortuito casu amiserit quod accepit, veluti incendio, ruinâ, naufragio, aut latronum hostiumve incursum nihilominus obligatus manet. Instit. lib. 3, tit. 15, § 2; Noy's Maxims, 91; Doct. & Stud. Dial. 2, ch. 38; Bract. 99, a., b.

(b) Noy's Maxims, ch. 43.

the specific thing lent within a reasonable period after request, and if he neglects so to do, he is responsible for all accidents that afterwards happen to it. He has no right either by the civil or the common law to detain the thing borrowed for any antecedent debt due to him. (c) "The plain reason is that it would be a departure from the tacit obligations of the contract. No intention to give a lien for debt can be implied from the grant of a mere favour." Neither can the borrower set up a right to detain the chattel for the payment of necessary expenses incurred by him in the keeping and preserving it.

COUNTERMAND *of the loan*.—In the Roman law, and by the foreign codes derived therefrom, the loan, when once effected by the delivery of the thing lent to the bailee, cannot be revoked, and the borrower be compelled to return it before he has had the contemplated use and enjoyment of it. In the common law, however, the bailment for use being gratuitous, it may be revoked at any time, and the borrower is bound to deliver back the chattel within a reasonable period after request.

(c) Story's Bailm. p. 183.

CHAPTER XXVI.

CONTRACTS WITH INFANTS, DRUNKARDS, AND PERSONS OF UNSOUND MIND.

SECTION I.—*Liabilities ex contractu of infants.*—Of the capacity of infants to contract—Leases granted by infants—Void and voidable contracts by infants—Incapacity of infants to trade or enter into trading contracts—Contracts that may be entered into by infants—Liability of infants for necessities—Things held not to be necessities—Things which may or may not be necessities according to the condition in life of the infant—Ratification of contracts entered into during infancy—Authentication and effect of the ratification—Signature of the written memorandum thereof—Ratification of an account stated during infancy—Of the liability of adults contracting with infants.

SECTION II.—*Liabilities ex contractu of drunkards and persons of unsound mind.*—Contracts by drunkards—Of the incapacity to contract resulting from complete intoxication—Distinction between complete and partial intoxication—Contracts by lunatics and persons of unsound mind—Liability ex contractu of lunatics when no advantage has been taken of their mental infirmity—Liability of persons of unsound mind for necessities.

SECTION I.

LIABILITIES EX CONTRACTU OF INFANTS.

ALL individuals below the age of twenty-one years are in law called infants, and all infants are, by reason of their inexperience and the immaturity of their judgment, clothed only with a qualified power of contracting; *i. e.*, their contracts will bind them, provided they were necessary

and for their benefit and advantage; but if they were unnecessary and unfit and improper contracts for them to have entered into, they will be entitled to recede from them and vacate them. All penal obligations (ante, 169—182) entered into by infants are absolutely void, as it is not necessary for them, nor can it be for their benefit and advantage, to subject themselves to a penalty. (a) All deeds, also, and covenants, feoffments, grants, releases, confirmations, cognovits, obligations, or other writings under seal made by infants are, as a general rule, (subject to some few exceptions presently noticed, (post, 860, 861.) void; (b) and an infant cannot, as we have already seen, be sued on his covenant to serve, contained in an indenture of apprenticeship, executed by him; (c) nor on a bill of exchange accepted by him, although the bill may have been accepted on account of necessities furnished to such infant; (d) nor for a breach of a warranty made by him on the sale of a horse; (e) nor is he bound by an agreement to refer disputes to arbitration, nor by the recitals in any deed executed by him during infancy. (f)

A contract by a female infant for the sale of her necessary wearing apparel, ornaments, and articles of dress, or of the hair growing on her head, is absolutely void. Thus, where Anna Secrogham brought an action through her guardian against a barber, "*quare vi et armis insultum fecit, et totum crinem capitis ipsius Annæ abscidit,*" and the defendant pleaded not guilty as to all the trespass *præter tonsuram crinis*, and as to that he pleaded that the plaintiff was of the age of sixteen years, and for a certain sum of money *licentiauit*, the defendant *duas uncias crinis dictæ Annæ detondere et abscindere*, it was held on demurrer that the plea was bad and the tonsure unlawful, inasmuch as the infant had no power of entering into the contract or of giving the license or authority set forth in the plea. (g) But if the infant had been attacked by fever, and the cutting off of her hair had been necessary for her health, then the contract would have been a necessary and beneficial and valid contract, and the barber would have been fully justified in what he had done. The law does not permit infants to borrow money to be expended by them at their own discretion, and an action, consequently, is not main-

(a) Co. Litt. 172, a. *Ayliff v. Archdale*, Cro. Eliz. 920. *Fisher v. Mowbray*, 8 East, 330. *Baylis v. Dineley*, 3 M. & S. 477. *Corpe v. Overton*, 10 Bing. 257; 3 M. & Sc. 738, s. c.

(b) Co. Litt. 171, b. *Oliver v. Woodroffe* 4 M. & W. 650.

(c) *Gilbert v. Fletcher*, Cro. Car. 179; ante, 749, 750.

(d) *Williamson v. Watts*, 1 Campb. 551.

(e) *Howlett v. Haswell*, 4 Campb. 118. *Green v. Greenbank*, 2 Marsh. 485. *Grove v. Nevil*, 1 Keb. 778.

(f) *Watson's Arbitr.* 40, 1, 2. *Müller v. Lord Harewood*, 18 Ves. 274.

(g) *Anna Secrogham per Guardianum v. Stuartson*, 3 Keb. 369; Bac. Abr., INFANTS, (I.)

tainable for the recovery of money lent and advanced to an infant if the infancy is pleaded in bar of the action, although the money has been borrowed by the infant to be expended in the purchase of the necessities of life, as the infant may misapply the money, and the law will not trust him. (*h*) Neither can an action be maintained against an infant on an account stated, as the law presumes that he has not sufficient capacity for business to state and settle accounts, so as to be bound thereby. (*i*)

All contracts also entered into by infants in the exercise of a trade may be avoided by them, for the law does not consider it to be necessary or beneficial for infants to embark in trade and hazard their fortunes in commercial speculations "Trading is not immediately necessary *ad victum et vestitum*, and if it were allowed, infants might be infinitely prejudiced." An action, consequently, cannot be maintained against an infant who carries on trade for work done for him, or goods or merchandize sold, or for the rent of houses and buildings hired by him, in the course of that trade, although he gains his living thereby; (*j*) nor upon a bill of exchange drawn, accepted, or indorsed by an infant in carrying on trade. (*k*)

INFANTS *living under the PARENTAL ROOF* cannot in general be made responsible for the payment of the price of clothes and wearing apparel ordered by them and delivered at the residence of the parent. "If an infant lives with his parent, who provides such apparel as appears to the parent to be proper, so that the child is not left destitute of clothes or other real necessities of life, the child cannot bind himself to a stranger even for what might otherwise be allowed as necessities; for no man shall take upon him to dictate to a parent what clothing the child shall wear, at what time they shall be purchased, or for whom. All that must be left to the discretion of the father and mother." (*l*) If, therefore, a child, living at home with its father, orders clothes of a tailor, and the clothes are sent to the father's residence, and the latter disapproves of the proceeding as soon as he is made acquainted with it, and sends the clothes back, the tailor will have no claim against anybody for the payment of the price of them. He cannot sue the parent, because he has

(*h*) *Earle v. Peale*, 1 Salk. 387; 10 Mod. 67, s. c. *Darby v. Boucher*, ib. 279. *Probart v. Knouth*, 2 Esp. 472, n. *Smith v. Gibson*, Peake, 863. As to money paid for the use of an infant, see post, 863.

(*i*) *Trueman v. Hurst*, 1 T. R. 42. *Ingledew v. Douglas*, 2 Stark. 36. *Oliver v. Woodruffe*, 4 M. & W. 650. As to subsequent ratification by adults of accounts stated during infancy, see post, 870.

(*j*) *Dilk v. Keighley*, 2 Esp. 480. *Whittingham v. Hill*, Cro. Jac. 494. *Whywall v. Champion*, 2 Str. 1083. *Lowe v. Griffith*, 1 Sc. 458; 1 Hodg. 30.

(*k*) *Williams v. Harrison*, Carth. 160. *Williamson v. Watts*, 1 Campb. 551.

(*l*) *Bainbridge v. Pickering*, 2 W. Bl. 1325. *Cook v. Deaton*, 3 C. & P. 114. *Story v. Perry*, 4 C. & P. 526.

not sanctioned or authorized the contract; (*m*) neither can he sue the infant, for as the latter was provided for in the father's house, he was under no necessity of contracting for the purchase of goods on his own credit. If the tradesman suffers in such a transaction, it is his own fault; for he ought to have made inquiries of the parent, and have ascertained whether the contract was sanctioned and authorized by the latter. If, indeed, he can show that the parent was aware of the order given by the infant, and of the delivery of the goods at his residence, or that he saw the infant using and wearing the articles, and made no objection thereto, and no exercise of his parental authority and control to prevent further supplies of such articles, this will be strong evidence to show that the father authorized the order to be given, so as to render him responsible as the principal in the transaction and the real purchaser of the articles through the medium of his child acting as his agent in that behalf. (*n*)

If an infant is placed at a boarding-school by a parent or guardian, the master has not in general any remedy against the infant, but must resort to those with whom he agreed for the infant's board and instruction. (*o*)

And a plaintiff cannot convert a breach of duty arising out of a contract into a tort, so as to charge the infant in an action *ex delicto* with the damage resulting from such breach of duty. Therefore, if a horse lent to an infant is immoderately ridden by the latter and is injured, the infant is protected from liability by his infancy. (*p*)

As an infant cannot lawfully be a trader, he cannot be made a bankrupt under the bankruptcy acts. (*q*)

CONTRACTS *that may be entered into by* INFANTS.—But infants are not rendered absolutely incapable of contracting, for "the law at the same time that it protects their imbecility and indiscretion from injury through their own imprudence, enables them to do binding acts for their own benefit." (*r*) They may grant leases when it is manifestly to their interest and advantage that such leases should be granted, and will not be per-

(*m*) *Blackburn v. Mackey*, 1 C. & P. 1. *Burrough, J., Fluck v. Tollemache*, ib. 5. *Crantz v. Gill*, 2 Esp. 472. *Roffe v. Abbott*, 6 C. & P. 286. *Clements v. Williams*, 8 C. & P. 58.

(*n*) *Baker v. Keen*, 2 Stark. 502. *Nichole v. Allen*, 3 C. & P. 36. *Heuketh v. Gowing*, 5 Esp. 132. *Law v. Wilkins*, 6 Ad. & E. 718; 1 N. & P. 697, *n. c.* As to the liability of the father for things furnished to his children by order of the mother, or of his own servants, see

Ravelyns v. Vandyke, 3 Esp. 252. *Cooper v. Phillips*, 4 C. & P. 581. *Furillio v. Crother*, 7 D. & R. 612. *Stone v. Carr*, 3 Esp. 1; ante, 398—401, 613.

(*o*) *Duncomb v. Tickridge*, Allyn, 94; Bac. Abr. Inf. (I.) 1.

(*p*) *Jennings v. Rundall*, 8 T. R. 335.

(*q*) *Belton v. Hodges*, 2 M. & Sc. 496; 9 Bing. 365, *n. c.* *Ex parte Moule*, 4 Ves. 603.

(*r*) Lord Mansfield, *Zouch v. Parsons*, 3 Burr. 1801.

mitted to avoid them when they come of age. (s) "The privilege given by law to infants is given as a *shield*, not as a *sword*, and shall never be turned into an offensive weapon of fraud and injustice." (t) Therefore, if an infant contract for necessary repairs to be done to his dwelling-house, or to any description of property belonging to him, he will not be allowed to avail himself of his infancy as an answer to a fair claim for the payment of the price of the work so done. In *Tirrell's case*, indeed, Haughton, J. is reported to have said, that "if an infant's house stands in need of repairs, his contract for the repair of it does not bind him, for no contract binds an infant but such as concerns his person." (u) But this doctrine cannot be considered to be law at the present day.

By the custom of gavelkind, an infant at the age of fifteen is reckoned at full age to sell his lands, but under great limitations and restrictions, to prevent him from being defrauded. And by custom in some places, an infant seised of lands in socage may at the age of fifteen years make a lease for years, which shall bind him after he comes of age, for the custom makes fifteen his full age to that purpose. (x)

LIABILITIES of INFANTS who are not residing under the PARENTAL ROOF.

If the infant is an orphan, or is residing at a distance from the parents, and is not provided with the necessaries of life under their personal superintendence, management, and control, such infant is clothed with the power of entering into fair and just and reasonable contracts for supplying himself with the necessaries of life. "An infant may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessaries, and likewise for his good teaching and instruction, whereby he may profit himself afterwards; and this is in benignity to infants, for if they were not allowed to bind themselves for necessaries, no person would trust them, in which case they would be in worse circumstances than persons of full age." (y) It has accordingly been said, that an infant may enter into a contract under seal, and give a simple bond, or bond without a penalty, "for his necessary meat and drink, or his necessary apparel, or his fit schooling, and shall not avoid the same." (z) It is not, however, in any

(s) *Maddon v. White*, 2 T. R. 161.

(t) *Ld. Mansfield, Zouch v. Parsons*, 3 Burr. 1801. *Smith v. Low*, 1 Atk. 489. *Ashfield v. Ashfield*, Sir Wm. Jones, 157. *Baylis v. Dinley*, 3 M. & S. 480.

(u) *Tirrell's case*, 2 Rolle, 271; *Anon.* 1 Salk. 196.

(x) *Bae. Abr. INF. (A.) Co. Litt.* 45, b.

(y) *Co. Litt.* 172, a. *Bae. Abr. INFANTS (I.) Lord Mansfield, Zouch v. Parsons*, 3 Burr. 1802. *Pickering v. Gunning*, Wm. Jones, 182.

(z) *Perkins*, s. 14. *Russell v. Lee*, 1 Lev. 86.

way necessary for an infant to bind himself by deed for the payment of the price of the necessities of life furnished to him by third parties, and such contracts would at the present day be regarded with great jealousy and suspicion by the courts.

The infant cannot bind himself to the payment of any particular sum for necessities, or to give any particular price for them. The law permits those who minister to his necessities to receive only a reasonable price, and does not leave the determination of the amount to the infant, but entrusts it to the arbitrament of a jury. (a) In the case of simple contracts for necessities, it must be shown "that the things were actually necessary, and of reasonable prices, and suitable to the infant's degree and estate, which regularly must be left to the jury. . . . If an infant promises another that if he will find him meat, drink, and washing, and pay for his schooling, he will pay £7 yearly, the infant is liable to an action for a breach of this promise, for learning is as necessary as any other things; and though it is not mentioned what learning this was, yet it shall be intended what was fit for him till it be shown to the contrary; and though he to whom the promise was made does not instruct him, but pays another for it, the promise of repayment thereof is good." (b) An infant may be made liable for the rent of the house or the apartments he lives in, provided the rent is reasonable, and the lodging fit and proper for a person in his station in life, (c) and the house or apartments and premises have been hired by him to dwell in, and not for the purpose of enabling him to carry on trade; (d) also for clothes and lace, silks, and wedding garments furnished to him, such clothes and dresses being suitable for the use of a person of his rank and station in life; (e) also for food, clothing, nursing, attendance, and necessities furnished to his wife and family and infant children residing with him. (f)

We have already seen, that if an infant embarks in trade, an action is not maintainable against him upon contracts entered into by him in the course of that trade; and that he is not responsible for the payment of the price of goods and merchandize sold to him, to be used and dealt with by him in the way of his trade (ante, p. 859). But for all the ordinary necessities of life, food and clothing, groceries, and necessary articles of furniture supplied to him, to be used or consumed in his own household,

(a) Cas. Law and Eq. 185.

(b) Bac Abr. INF. (I.) 1.

(c) *Kirton v. Elliott*, 2 Bulstr. 69. *Evelyn v. Chichester*, 3 Burr. 1719.

(d) *Lowe v. Griffith*, 1 Sc. 458. Ante, 859.

(e) *Rainsford v. Fenwick*, Cart. 215. *Dalton*

v. Gibb, 5 Bing. N. C. 198. *Brayshaw v. Eaton*, ib. 234.

(f) Bacon's Maxim, B. 18, p. 67, ed. 1639. *Turner v. Trisby*, 1 Str. 168. Alderson, B., *Chapple v. Cooper*, 13 M. & W. 259.

and not to be sold again, or otherwise dealt with in the way of his trade, he will be responsible. (g)

We have seen also, that an infant cannot borrow money so as to render himself liable to an action for money lent, although the money may be expended by him in the purchase of necessities; (h) but if the money of a third party is laid out in the purchase of necessities for the infant, under the personal superintendence and direction of such third party, it may then be recovered from the infant in an action for money paid. (i)

LIABILITY of an INFANT WIDOWER or WIDOW for the expenses of the funeral of a DECEASED WIFE or HUSBAND.—If an infant widower gives directions for the funeral of a deceased wife, he is personally responsible for the expenses thereof; and the same liability arises in the case of an infant widow, who has given an order to an undertaker for the burial of a deceased husband, although the latter may have died in insolvent circumstances.

In an action brought against an infant widow for the expenses of the funeral of her late husband, who had been buried by her orders, it was contended that the contract was not a contract for her benefit, and that the things furnished were not necessities for which an infant could be made responsible; but the court was of a different opinion. "The law," observes Alderson, B., "permits an infant to make a valid contract of marriage, and all necessities furnished to those with whom he becomes one person by or through the contract of marriage, are in point of law necessities to the infant himself. Now there are many authorities which lay it down that decent christian burial is part of a man's own rights, and we think it is no great extension of the rule to say, that it may be classed as a personal advantage, and reasonably necessary to him. His property, if he leaves any, is liable to be appropriated by his administrator to the performance of this proper ceremonial. If, then, this be so, the decent christian burial of his wife and lawful children, who are the *personæ conjunctæ* with him, is also a personal advantage, and reasonably necessary to him, and then the rule of law applies that he may make a binding contract for it. This seems to us to be a proper and legitimate consequence from the proposition that the law allows an infant to make a valid contract of marriage. If this be correct, then an infant husband or parent may contract for the burial of his wife or lawful children; and then the question arises whether an infant widow is in a similar situation. It may be

(g) *Tuberville v. Whitakhouse*, 1 C. & P. 94.

(h) Ante, 859. *Smith v. Gibson*, Peake, 52.

(i) *Ellis v. Ellis*, 12 Mod. 197; 1 Raym.

344, s. c. *Harris v. Lee*, 1 P. Wms. 482, 558.

Clarke v. Leslie, 5 Esp. 28. *Hedgley v. Holt*,

4 C. & P. 104. Ante, 226—231.

said that she is not, because during the coverture she is incapable of contracting, and after the death of the husband the relation of marriage has ceased. But we think this is not so. In the case of the husband, the contract will be made after the death of the wife or child, and so after the relation which gives validity to the contract is at an end to some purposes. But if the husband can contract for this, it is because a contract for the burial of those who are *personæ conjunctæ* with him by reason of the marriage, is a contract for his own personal benefit; and if this be so, we do not see why the contract for the burial of the husband should not be the same as a contract by the widow for her own personal benefit. It may be observed, that as the ground of our decision arises out of the infant's previous contract of marriage, it will not follow from it that an infant child or more distant relation would be responsible upon a contract for the burial of his parent or relative. (k)

CONTRACTS for NECESSARIES—*Things held NOT to be NECESSARIES*.—The question as to what things are and what things are not necessities suitable for an infant who is living away from the parental roof and supplies his own wants from funds of which he has himself the management, is a mixed question of law and fact, to be determined by the particular circumstances of each case. There are, however, many things which cannot be necessary for the use of an infant under any circumstances, and respecting which no valid contract can be entered into. Race-horses, for example, are not necessities; nor racing jackets, nor diamonds, nor jellies, confectionery, and sweetmeats, nor extravagantly luxurious dinners, choice wines, and rare fruits, nor costly equipages and horses, and an action cannot, consequently, be maintained against an adult for the price of such things furnished to him during his infancy. "This rule imposes no hardship upon tradesmen; if they do not intend to pander to extravagance, let them not give credit." (l) If, indeed, horses or carriages, diamonds or jewels, or costly articles of any description, have been delivered to an infant pursuant to an intended contract of sale, and the latter has them in his possession at the time of his coming of age, and has not paid, and will not pay the price of them, the intended vendor may demand them back, and if they are not returned, (the adult having them at the time in his possession and under his control,) the vendor would be entitled to recover the value of them in an action of trover. If the infant, after he has attained his majority, keeps the things, and at the same time repudiates the contract of sale and refuses

(k) *Chapple v. Cooper*, 13 M. & W. 259, 260.

(l) *Brooker v. Scott*, 11 M. & W. 67. *Whar-*

ten v. Mackenzie, Cripps v. Hill, 5 Ad. & E. N. S. 606, 614. *Burghart v. Angerstein*, 6 C. & P. 698. *Charters v. Bayntun*, 7 ib. 52.

to pay the price of them, the right of property reverts in the vendor, (the contract being at an end,) and the quondam infant cannot lawfully detain them after their return has been demanded by the true owner, for the privilege of infancy is, as we have before seen, to be used as a shield, and not as a sword :—as a defence against the demands of unconscientious and rapacious creditors,—and not as an offensive weapon of fraud. “If a young man perceives that he has been practised or imposed upon, he may honestly avail himself of the privilege of his non-age to defeat the circumvention ; but if he shelters himself under this privilege to avoid a fair obligation, he extends the privilege to a case in which it is not allowed in intention of law, and in which, consequently, it does not in natural justice exist.” (m) It is possible, also, that if jewels and race-horses, and things that are not necessities, have been delivered to an infant during his infancy, and the latter has them in his possession, and keeps and uses them after he comes of age, and refuses to return them after demand, the law would raise an implied promise from him to pay the fair value of them, as in the case of a drunkard, to whom goods are furnished whilst he is in a state of complete intoxication, and who is liable for the price of them if he keeps them and refuses to return them when he becomes sober.(n)

Riding in gigs and upon horseback has been held not to be necessary for an infant, and where an Oxford jury, in an action brought by a livery-stable keeper against a student at the University for the hire of horses and gigs supplied by him to the latter, found that the gigs and horses were necessary and suitable for a student at the University, and gave a verdict for the plaintiff contrary to the opinion of the judge, the court granted a new trial without payment of costs.(o) But if the infant be an invalid, and horse or carriage exercise is recommended by a medical man, and is resorted to by the infant for the restoration of his health, then it will be considered necessary, and the infant will be bound to pay for it.(p)

Things which may or may not be NECESSARIES according to the CIRCUMSTANCES and CONDITION IN LIFE of the INFANT.—There are certain classes of things, as we have already seen, absolutely necessary to all manner of men, such as food, clothing, lodging, and education, but the description of the food, clothing, and lodging, and the character and extent of the education, will vary according to the varying circumstances and condition in life of different individuals. “The infant’s clothes may be fine or coarse according to his rank ; his education may vary according to the sta-

(m) Paley’s Moral Philosophy.

(n) Alderson B., *Gore v. Gibson*, 14 Law J., N. S. (Exch.) 153; 13 M. & W. 623, n. c.

(o) *Harrison v. Fane*, 1 Sc. N. R. 287; 1 M. & Gr. 550, n. c.

(p) Coleridge J., 5 Ad. & E. n. s. 612, 613.

tion he is to fill, and the extent of his probable means when of age; and the nature and number of his servants and attendants will depend on his position in society. A servant in livery may be allowed to a rich infant, because such attendance is commonly appropriated to persons in his rank of life." (q) Therefore, it has been holden that expensive uniforms are necessary for infant officers in the guards, who have large expectations on coming of age, (r) and the ordinary volunteer regimentals to infant members of a volunteer corps. (s) Silks, furs, and velvets may be necessary and suitable for a young lady of rank and station in society, who sports a carriage and servants in livery, and appears at the tradesman's shop surrounded with the ordinary accompaniments of wealth and station, (t) and a gold watch-chain and a pair of gold breast-pins may be necessary and suitable for the use of an undergraduate at the university, the eldest son of a member of parliament and gentleman of fortune, but "twenty breast-pins could not be necessary." (u) "All such articles as are purely ornamental are not necessary, and for such things, therefore, an infant cannot be made responsible. But if they are not strictly of this description, then the question arises whether they were bought for the necessary use of the party in order to support himself properly in the degree, state, and station of life in which he moved, if they were, for such articles the infant may be made responsible." (x)

When the infant is living away from home, and the goods ordered by him are not delivered at the residence of the parent, the tradesman is not bound to inquire into the private means at the disposal of the infant, or how and to what extent he is supplied with clothing and necessities by his relations and friends. (y) But the tradesman ought to make inquiry into the general habits and mode of life of the infant, and his probable means on coming of age, before he supplies him with expensive articles, or with any large quantities of things. If he panders to the extravagance of youth, and furnishes things which he might have ascertained by inquiry to be unnecessary and unsuitable for the infant, the courts will not enforce his claim for payment against the latter. (z)

(q) *Alderson B.*, 13 M. & W. 258. *Hands v. Slaney*, 8 T. R. 578.

(r) *Burghart v. Hall*, 4 M. & W. 730.

(s) *Coats v. Wilson*, 5 Esp. 152.

(t) *Dalton v. Gib*, 5 Bing. N. C. 198.

(u) *Peters v. Fleming*, 6 M. & W. 43.

(x) *Parke, B.*, ib. 47.

(y) *Brayshaw v. Eaton*, 5 Bing. N. C. 23. *Burghart v. Hall*, 4 M. & W. 727. *Peters v. Fleming*, 8 M. & W. 48.

(z) *Ford v. Fothergill*, Peake, 301. *Burghart v. Angerstein*, 6 C. & P. 699. *Wharton v. Mackenzie*, 5 Ad. & E. n. s. 612.

RATIFICATION by ADULTS of contracts entered into during INFANCY.

Ratification of DEEDS.—We have already seen that contracts under seal (excepting necessary and beneficial leases, ante, 860, 861,) entered into by the infant during his infancy are in general void. A deed executed during infancy cannot be ratified by any verbal or written promise or acknowledgment by the infant after he attains his majority ; (a) nor can it, strictly speaking, be ratified at all. In order to be of any force or effect as against a party who has executed it during infancy, it must be re-executed and re-delivered by such party after he comes of age. The deed must, in fact, be re-made, and an entirely new contract created, bearing date after the party has attained his majority. The mere re-delivery of the old deed will not suffice to set it up as a binding contract, for “if an infant make a deed, and deliver it within age, and, afterwards, upon his coming of full age, deliver it again, yet the deed is void, for the deed must take effect from the first delivery, or not at all.” (b) As regards LEASES, however, granted by an infant, the validity of which depends upon the advantage or disadvantage of the lease to the infant, if it be questionable whether the lease was necessary and beneficial to him, and fit and proper to be granted, and, consequently, a valid lease ; or whether it was an improvident and foolish contract detrimental to his interests, and consequently invalid ; the conduct of the infant on his attaining his majority may be taken into consideration. If he accepts rent from the lessee, and does acts affirmatory of the contract, the lease will (if the contract is of a doubtful character, and the benefit equivocal) be deemed to have been a necessary and beneficial lease, and will be valid and binding. (c) If, on the other hand, the infant repudiates the contract on his attaining his majority, this will be *prima facie* evidence the other way ; but it is not the infant's conduct alone which will be decisive of the question.

In the case of an infant lessee, where an estate has been granted to an infant at a certain rent, if the latter remains in possession of the property demised to him, and pays rent after he attains his majority, this will be very strong evidence that the contract was for his benefit, and he will not afterwards be allowed to repudiate it. “If an infant takes a lease for years of land, rendering rent which is in arrear for several years, and then the infant comes of age and still continues the occupation of the land ; this makes the lease good and unavoidable, and by consequence makes him chargeable with all the arrears incurred during his minority ; for though at

(a) *Baylis v. Dineley*, 3 M. & S. 477.
(b) *Bac. Abr. Inf.* (A.)

(c) *Baylis v. Dineley*, 3 M. & S. 481. *Smith v. Low*, 1 Atk. 489.

full age he might have departed from the bargain, and thereby have avoided payment of the arrears, which the lessor suffered to accrue during the minority, yet his continuance in possession after his full age ratifies and affirms the contract *ab initio*, and so gives remedy for the arrears of rent incurred from the time of the contract made." (d)

RATIFICATION OF SIMPLE CONTRACTS.—The stat. 9 Geo. 4, c. 14, s. 15, enacts, as we have already seen, that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith.

Form of the WRITTEN RATIFICATION or PROMISE.—The mere fact of the confirmation or ratification of the debt, or of the making of the promise is all that is required by the statute to be evidenced by writing. A date, therefore, is not necessary to the validity of the written instrument, nor need it be stated on the face of the writing that the debt was contracted during the infancy of the promisor, nor need the name of the creditor or of the party to whom the promise is made be expressed therein, or the amount of the debt. Oral evidence may be given for the purpose of establishing these necessary particulars. Therefore, where the plaintiff brought an action for the price of goods sold and delivered to the defendant, and the latter pleaded his infancy, and the plaintiff replied that the defendant after he had attained his age of twenty-one years ratified and confirmed the contract, and produced a letter in the defendant's handwriting, but without any address, to the following effect:—"Sir,—I am sorry to give you so much trouble in calling, but I am not prepared for you; but will, without neglect, remit you in a short time," it was held that the plaintiff might show through the medium of oral evidence that the defendant whilst he was an infant contracted a debt with the plaintiff, and that when the defendant came of age the plaintiff sent his servant with the account to the defendant, and demanded payment of the debt, that the defendant desired the servant to call again the same day, which the latter did, and then received from the defendant's servant the aforesaid letter, and that the letter, taken in connexion with these circumstances, was a sufficient ratification and confirmation of the contract within the statute, and that it was for the jury to determine the amount of the debt and the extent of the liability. (e)

(d) Bac. Abr. Infancy (K.) 8. *Kotsey's case* Dineley, 3 M. & S. 481.
Cro. Jac. 320; 2 Bulstr. 69, s. c. *Baylis v.*

(e) *Hartley v. Wharton*, 11 Ad. & E. 934.

If an infant accepts a bill of exchange, or makes a promissory note during his infancy, and signs, after he has attained his majority, a written order or authority to his banker or agent, directing him to pay the amount of such bill or note, this is such a ratification of the contract as will render him liable to be sued upon the bill or note. *(f)*

Signature of the ratification or promise.—The statute, it will be seen, requires the writing to be signed by the party himself, and does not, like the statute of frauds, provide for a signature by an agent (*ante*, 70). A letter, therefore, written by a wife in her husband's name, acknowledging the existence of a debt contracted by him during his infancy, and promising to pay the amount, will not bind the husband, although he may have expressly authorized her to write the letter and sign his name to it. *(g)*

Effect of the RATIFICATION.—The ratification, when made in writing according to the statute, relates back and gives effect to the original claim, and fixes the defendant with an obligation springing out of the old contract. *(h)* If a promise in writing to pay the debt be made and signed by the party after he comes of age, this may, it seems, be treated either as a ratification and confirmation of the old contract, or as a new contract based upon and supported by the original consideration. *(i)* If an infant has borrowed money during his infancy, and after he has attained his majority, signs with his own hand a written promise to pay the amount, he will be liable upon such promise. *(k)* It has been said, that if the infant has given a bond to secure the repayment of the money, he cannot be sued upon any subsequent promise to pay the amount, as the specialty operates as an extinguishment of the simple contract debt *(l)* But we have already seen that such a bond would be void, and that any action brought thereon may be defeated by pleading the infancy of the obligee; it can hardly, therefore, (being in itself an invalid and nugatory instrument,) do away with the effect of a written promise made by the infant after he comes of age to pay the sum borrowed. *(m)* If the promise to pay the debt be a conditional promise, such as a promise by the party to pay "as soon as he is able," the condition must be accomplished, and the

(f) *Hunt v. Massey*, 5 B. & Ad. 902; 3 N. & M. 109, s. c.

(g) *Hyde v. Johnson*, 3 Sc. 296; 2 Bing. N. C. 776.

(h) *Gibbs v. Merrill*, 3 Tannt. 307. *Hunt v. Massey*, 5 B. & Ad. 902; 3 N. & M. 109, s. c. *Hartley v. Wharton*, 11 Ad. & E. 934; 3 P. & D. 529, s. c. *Williams v. Moor*, 11 M. & W. 263, 264.

(i) *Cohen v. Armstrong*, 1 M. & S. 724.

Southerton v. Whitlock, 2 Str. 690. *Hawkes v. Saunders*, 1 Cowp. 289. *Borthwick v. Carruthers*, 1 T. R. 648. *Heyling v. Hastings*, 1 Lord Raym. 389. *Bayley, J., Thornton v. Illingworth*, 4 D. & R. 547.

(k) *Ball v. Hesketh*, Comb. 381.

(l) *Tapner v. Davenant*, 3 Keb. 798; Bull. N. P. 153, s. c.

(m) *Edmond's case*, 3 Leon. 164; 4 Leon. 5.

ability of the party to pay must be established before any action can be maintained upon the promise. (n) If the declaration in an action upon such a promise sets forth an absolute promise to pay the debt, and a conditional promise only is proved, the action must necessarily fail. (o)

The promise to pay the debt must, in all cases, be made before action brought; for a replication to a plea of infancy that the promise to pay was made by the defendant after he came of age is not sustained by proof of a promise to pay after action commenced. (p) The promise must also, in all cases, be obtained without misrepresentation or fraudulent concealment. If a plaintiff has furnished a defendant during his infancy with things which were not necessities, and has obtained a promise from the latter, after he came of age, to pay for them, and has at the same time purposely kept back his account and not given the defendant any opportunity of knowing the amount of the claim until after the promise to pay has been obtained, this will be strong evidence of fraud on the part of the plaintiff, disentitling him to rely on the promise; (q) and if the promise has been obtained by threats or by duress it is of course void. (r)

Ratification of an ACCOUNT STATED.—If an infant having had dealings with an adult, meets and settles accounts with him during his infancy, in the ordinary way, and a balance is struck, and on attaining his age of twenty-one years he confirms the settlement, and signs a written promise or agreement to pay such balance, he will be liable for the amount thereof. "The principle on which the law allows a party who has attained his age of twenty-one years to give validity to contracts entered into during his infancy is, that he is supposed to have acquired the power of deciding for himself, whether the transaction in question is one of a meritorious character, by which in good conscience he ought to be bound; and there seems nothing in the liability on an account stated to take that out of this general principle. It was indeed argued for the defendant, that on an account stated an infant derives no benefit, that he does not, as on a purchase of goods, get any thing valuable, and he has no *quid pro quo*. But this is a fallacy; an infant stating an account gets precisely the same benefits as an adult gets on similar transactions. He makes certain the previously uncertain state of the transactions between himself and the person with whom he is stating accounts, and he

(n) *Gould v. Shirley*, 2 M. & P. 581. *Scales v. Jacob*, 4 M. & P. n.; 3 Bing. 644; 11 Moore, 570, s. c. *Tanner v. Smart*, 6 B. & C. 609.
(o) *Haydon v. Williams*, 4 M. & P. 818; 7 Bing. 163, s. c.

(p) *Thornton v. Illingworth*, 4 D. & R. 545; 2 B. & C. 824, s. c.
(q) *Brooks v. Galley*, 2 Atk. 34.
(r) *Harmer v. Kilking*, 5 Esp. 101.

gets rid of the necessity of preserving vouchers. This, in the case of an adult, is a sufficient consideration to create a debt, and we can discover no reason why it should not have the same effect in the case of an infant, supposing him to adopt and ratify it after he comes of age.”(s)

Of the LIABILITY of ADULTS contracting with INFANTS.

It has already been stated to be a principle of the common law in the case of contracts founded on mutual promises, and a mutuality of obligation, that although an infant who has entered into such a contract with a person of full age, may take advantage of his minority and resist the fulfilment of his engagement, that right cannot be urged by the other party to show that as there was no mutual obligation there was no consideration for his promise, as in the case of mutual promises of marriage, contracts of hiring and service, and contracts of apprenticeship, where it is no answer to an action brought by the infant against the adult party to the contract, to say that as the infant is protected by his infancy from liability, there is no mutuality of contract or reciprocity of obligation, for “it is laid down as a general rule that infancy is a personal privilege, of which no one can take advantage but the infant himself, and that therefore, though the contract of the infant be voidable, that yet it shall bind the person of full age; for being an indulgence which the law allows infants to protect and secure them from the fraud and imposition of others, it can only be intended for their benefit, and is not to be extended to persons of the years of discretion, who are presumed to act with sufficient caution and security. And were it otherwise, this privilege, instead of being an advantage to the infant, might in many cases turn greatly to his detriment.”(t)

Therefore, where an infant brought an action by her guardian, and set forth that she gave the defendant 10*l.*, and promised to serve him for seven years, and that the defendant promised to find her with necessaries during the term, and to teach her to sing and to dance, but would not fulfil his promise, and the defendant alleged that there was no consideration for his undertaking, the agreement not being reciprocal, and the infant not being bound thereby; the court held that though the contract might be void as to the infant, yet it bound her mistress, who was of full age.(u) So, where a man of full age, and a female of sixteen exchanged mutual promises of marriage, and the infant brought an action against the man for a breach

(s) *Williams v. Moor*, 11 M. & W. 264, 265.
Parke, B.

(u) *Farnham v. Atkins*, 1 Sid. 446; 2 Keb. 623, s. c.

(t) *Bac. Abr. Infants. (T.) 4.*

of contract, it was held that the minority of the plaintiff, and her exemption from liability upon the contract, was not productive of a corresponding exemption from liability on the part of the defendant.(x) So, in the case of contracts of purchase and sale, and contracts for the performance of work, and all other contracts, the adult contracting party is bound and may be sued by the infant, although the latter has incurred no corresponding legal obligation.(y) (As to the liability of joint contractors where one of them is an infant, see post. ch. 27, p. 877.)

SECTION II.

LIABILITIES *ex contractu* of DRUNKARDS and persons of UNSOUND MIND.

Contracts with DRUNKARDS.—"A party who makes a contract in such a state of drunkenness as not to know what he is doing cannot be compelled to perform that contract by the other party who knew him to be in that state. A man who takes an obligation from another so circumstanced is guilty of actual fraud."(a) "It is evident," observes Pothier, (Obligations, No. 49,) "that drunkenness, when it goes so far as absolutely to destroy the reason, renders a person, so long as it continues, incapable of contracting, since it renders him incapable of consent." Therefore, where an action was brought upon a bill of exchange by the indorsee against the indorser, and the defendant pleaded that at the time he indorsed the bill he was so drunk as to be unable to comprehend the meaning or effect of the indorsement, or to contract thereby, of which the plaintiff at the time of the indorsement had notice; it was held that the

(x) *Holt v. Ward*, 2 Str. 987; 1 Barn. 290.

(y) *Warwick v. Bruce*, 2 M. & S. 205; 6 Taunt. 118, s. c. *Forrester's case*, Sid. 41. Keb. 1, s. c. *Davis v. Mannington*, 2 Sid. 109.

(a) *Parke, B.*, *Gore v. Gibson*, 14 Law J.,

N. S., (Exch.) 152; 13 M. & W. 626, s. c. *Cole v. Robins*, Bull. N. P. 172, s. *Pitt v. Smith*, 3 Campb. 33. *Fenton v. Holloway*, 1 Stark. 126.

plea was a good answer to the action. (b) And it should seem that if a bill of exchange or a promissory note be indorsed or accepted or made by a person in a *complete* state of intoxication, it cannot be enforced, as against the drunkard, by a *bonâ fide* holder who received and gave value for it on the credit of the acceptance or indorsement or signature, in ignorance of the drunkenness and of the fraudulent circumstances under which the instrument was obtained. (c) If a man, however, is able to write his name without any aid or assistance, it may well be doubted if he can be so completely intoxicated as not to have some knowledge of what he is doing, and if a bill so accepted or indorsed gets into the hands of a *bonâ fide* holder, he would be liable upon the instrument if a jury should be of opinion that he was only partially intoxicated at the time he accepted or indorsed it; for if a party enters into a contract in a partial state of intoxication only, he cannot escape from liability thereon, unless he can show that advantage was designedly taken of him by the other contracting party when he was not in a fit state of mind to take care of his own interests, or that some positive fraud was practised upon him by the person seeking to enforce the contract.

The law, although it throws its shield around the drunkard to protect him from fraud, will never permit him to make use of his own drunkenness, folly, or misconduct as a means of cheating and defrauding other people. If, therefore, a man has bought goods when he was so drunk as not to know what he was doing, and keeps the goods after he is sober, he will not be permitted to set up his drunkenness at the time of the purchase as an answer to an action for the purchase-money. (d)

Contracts with LUNATICS and persons of UNSOUND MIND.—If a party to a contract was at the time he entered into the engagement, a lunatic or a person of unsound mind, and any imposition appears to have been practised upon him, or any advantage taken of his infirmity by the other contracting parties, the contract will be void as having been procured by fraud; but if the contract is a fair and honest contract, and bears no symptoms of the infirmity of the mind of the party sought to be charged thereon, the courts will enforce it like any other contract. A lunatic or person of unsound mind cannot in general, however, enter into any contract under seal, and will not be bound by any deed entered into by him, (e) unless it be shown that the contract was entered into during a lucid interval; and if it be a necessary and beneficial contract for him to

(b) *Gore v. Gibson*, 13 M. & W. 623.

(c) *Sentance v. Poole*, 3 C. & P. 1.

(d) *Alderson, B., Gore v. Gibson*, ut supr.

(e) *Yates v. Boen*, 2 Str. 1104. *Thompson v. Leech*, 3 Salk. 301. Vin. Abr. (LUNATIC), *Beverley's case*, 4 Co. 1236.

enter into, such as a lease of his lands at an advantageous rent, the nature and character of the contract may be *prima facie* evidence of its being made during a lucid interval, and it would probably be deemed to be valid and binding. (f) An action for the price of goods sold and delivered, or of work done, or for the hire of horses, carriages, or servants, cannot be defeated by showing that the defendant had been found by inquisition to be a lunatic at the time he received the goods, or had the benefit of the work or the use of the horses, carriages, and servants, (g) for the law will not permit the lunatic's infirmity to be made an instrument of fraud upon third parties who have dealt with him in good faith, and have honestly ministered to his wants and necessities.

(f) *Sergeson v. Sealy* 2 Atk. 413. *Faulder v. Silk*, 3 Campb. 126.

(g) *Brown v. Jodrell*, 3 C. & P. 30; M. & M.

105, s. c. *Niell v. Morley*, 9 Ves. 478. *Dene v. Kirkwall*, 8 C. & P. 679. *Bagster v. Earl of Portsmouth*, 7 D. & B. 614; 5 B. & C. 1170.

CHAPTER XXVII.

JOINT AND SEPARATE CONTRACTS, AND JOINT AND SEVERAL LIABILITIES.

Of the joinder of joint contractors as defendants in actions upon joint contracts—Plea in abatement—Of the characteristics of a joint contract—Joinder of partners as defendants—Secret partnership not pleadable in abatement—Of the liability of joint contractors when one of them is an infant—Effect of judgment recovered against one of several joint contractors—Several contracts and separate liabilities—Joint and several contracts—Joint and several purchases.

JOINT AND SEVERAL LIABILITIES EX CONTRACTU. (a)

If a contract upon which an action has been brought be a joint contract, made by several persons jointly, and all the joint contractors are not made defendants, the action may be defeated by a plea in abatement of the non-joinder of them, provided such plea states that the omitted party is alive and resident within the jurisdiction of the court, (b) and the plea is verified by an affidavit setting forth the place of residence of such party. (c)

If a plea in abatement cannot be safely pleaded by reason of the number of the defendants and want of knowledge of their residences, separate

(a) *Ante*, 266—293.

(b) *Whelpdale's Case*, 5 Co. 119, a. *Gilbert v. Bath*, 1 Str. 503. *Rice v. Shute*, 5 Burr. 2612. *Abbott v. Smith*, 2 W. Bl. 947.

(c) By the term "residence" is meant the permanent dwelling-house or home of the party, and not his temporary place of residence. *Lambe v. Smythe*, 3 D. & L. 712.

actions may be brought, and the court will not consolidate such actions into one. (d)

"Each party to a joint contract is severally liable in one sense, i. e., if sued severally and he does not plead in abatement, he is liable to pay the entire debt, but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprizes the joint bond of all and the several bonds of each of the obligors." (e)

Joint contracts.—It may be laid down as a general rule, that if several persons agree to perform a particular act, they are bound jointly and not severally in the absence of express words creating a several liability. If two or more persons, for example, covenant generally for themselves without any words of severance, or that they, or one of them, shall do a particular act, a joint charge is created. (f) If three are bound in a bond by these words, "we bind ourselves, and each of us jointly," it is a joint obligation; for the word "jointly" makes the obligation joint, which the word "each" cannot make several. Any number of persons may bind themselves jointly for the performance of one entire duty, and so become sureties for one another for the thing contracted to be done. (g)

Upon the principle that all joint contractors must be jointly sued, it follows that upon all implied contracts with firms in partnership every actual or reputed partner must be made a defendant, to avoid the inconvenience of a plea in abatement. (h) And if two partners enter into a contract with a third person to pay him a certain sum of money out of their own private cash, the contract is a joint contract, and they must be jointly sued upon it. (i) But the plaintiff, in all actions against firms in partnership, is bound to join those only as defendants who were known to be partners at the time the contract was entered into, and his action cannot be defeated by the plea of a secret partnership in abatement. (k) He is entitled, as we have before seen, to sue all the actual and nominal partners, but cannot be compelled to sue those whom he did not know to be partners at the time of the making of the contract. Thus, where the defendant, a shipowner, having bought of the plaintiffs a large quantity of copper sheathing, and an action having been brought against him for

(d) *Giles v. Tooth*, 16 Law J., n. s., (C. P.,) 1846.

(e) Parke, B., *King v. Hoare*, 13 M. & W. 515.

(f) *Bacon's Abr. tit. Obligations.*

(g) 1 Saund. 291, b., n. 4.

(h) *Bristow v. James*, 7 T. R. 257. *Rice v. Saute*, 5 Burr. 2612; 2 W. Black. 694, a. c.

Lodge v. Dicus 3 B. & Ald. 611.

(i) *Byers v. Doherty*, 1 H. Bl. 286.

(k) *De Montfort v. Saunders*, 1 B. & Ad. 398.

the price of it, he pleaded in abatement the non-joinder of other part-owners, who were unknown to the plaintiff at the time the copper was supplied, but whose names might have been ascertained by consulting the ship's register; it was held by Lord Ellenborough, that a person, after treating as it were on his own account without any intimation of the existence of a partnership between himself and any other persons, should not be afterwards allowed to spring a mine upon the plaintiff by bringing forward a partner for the first time by his plea in abatement. "My only doubt," says his lordship, "arose from the consideration of the manner in which the property in a ship is acquired, and whether those means might not afford a more easy access to a knowledge of partners than in other cases. But this circumstance does not advance the matter, since, in the first place, a party possesses no compulsory means of obtaining access to the register, and if he could, the register would not be conclusive." (l)

Liability of joint contractors where one of them is an infant.—If one of several joint contractors was an infant at the time of the making of the contract, and has not since the attainment of his majority, and before the commencement of the action ratified the contract by some writing with his signature affixed, (ante, 872,) he ought not to be made a defendant with his co-contractors, but the action should be brought against the adult parties only. "When an adult is in partnership with an infant, and in that relation they enter into a contract with a third person, the adult shall not be permitted to avoid the contract he has so entered into by saying that his partner is an infant and incompetent to contract; but in such case the plaintiff may overlook the privity of the infant as to whom the contract is nugatory, and may describe it as a contract made by the adult contractor only. If he declares against them both on the joint contract, and the minor pleads his infancy, the plaintiff cannot enter a nolle prosequi as to him, and proceed in that action against the other defendant, but should commence a new action against the adult only." (m) If, in the action against the adult party only, the defendant pleads in abatement that he made the promise jointly with another person, the plaintiff must reply the infancy which excludes the supposition of a joint liability. Thus, if two partners, one of whom is an infant, accept a bill of exchange, the holder of the instrument must declare upon it as accepted by the adult partner only in the names of both, and if the defendant pleads the nonjoinder of the other partner in abatement, the plaintiff should reply his infancy, which is no departure,

(l) *Baldney v. Ritchie*, 1 Stark. 338. *Robinson v. Wilkinson*, 3 Price, 538. *Holcroft v. Hoggins*, 15 Law J., n. s., (C. P.), 129.

(m) Bac. Abr. Inf. (I) 4. *Chandler v. Parkes*, 3 Esp. 76. *Jaffray v. Frebrain*, 5 Esp. 47.

and the action may proceed.(n) So if a married woman is joined as a co-defendant, the plaintiff will be nonsuited, and the objection cannot be cured by entering a nolle prosequi as to the feme covert; but the action must be discontinued, and a new one brought omitting the married defendant.(o)

Extent and duration of the liability.—A judgment recovered in an action against one of two joint contractors is a bar to an action against the other. The judgment changes the nature of the cause of action, and prevents its being made the subject of another suit, although execution has not been issued, and the judgment itself remains unsatisfied.(p)

Effect of MISJOINDER.—When several persons are sued together as joint contractors, and the action cannot be supported against them all, it wholly fails, inasmuch as the contract proved in such a case differs from the one declared upon. It is safer, therefore, to join too few than too many persons as defendants in an action ex contractu.

Several contracts.—If two or more persons who have joined together in a contract “covenant severally,” or become “severally bound,” it is (in the absence of express words implying a joint liability) the same as if each of the covenantors had executed a separate deed on the same parchment. A joint action cannot, consequently, be maintained against the parties to such a contract,(q) but each must be sued separately upon the separate contract made by each. But, in order to constitute a separate liability only in those cases where several persons contract together for the performance of a particular act, the intention must be made plainly apparent by express words. This intention is to be gathered from a careful consideration of the whole tenor and general intent of the contract, and not from any particular words of plurality contained in it.

When the parties engage for the performance of distinct and several duties, mere words of plurality, such as “we bind ourselves,” will not make the contract joint. Thus where a bond was entered into in the following form:—*T. G. B. M.* am held and firmly bound in the sum of 12,000*l.* for which I bind myself, &c., &c., and *I J. E. W.* am held and firmly bound in the sum of 8000*l.*, for which I bind myself, &c.; and we, *P. P., S. J.* and *W E.* are also held and firmly bound in 2000*l.* each, for which we bind ourselves, and each of us for himself, for the whole and entire sum of 2000*l.* each; it was held that this was a several and not a joint and several bond; that it was plain from the recital and the whole

(n) *Burgess v. Merrill*, 4 Taunt. 468.

(o) *Salmon v. Smith*, 1 Saund. 207 a. n. (i).

(p) *King v. Hoare*, 13 M. & W. 506.

(q) *Elliott v. Davis*, 2 B. & P. 339. *Ma-*

thewson's case, 5 Co. 23 a. *Mathewson v. Lydiate*, Cro. Eliz. 408, 470. *Lee v. Nixon*, 1 Ad. & E. 201; 3 N. & M. 441, s. c.

object of the bond that it was the intention of the parties to be bound severally and not jointly, and therefore that the words "we bind ourselves" instead of "*I bind myself*" were not sufficient to control and overcome the plain general intent, and make the obligation joint as well as several. (r)

JOINT and SEVERAL contracts.—The rule that covenants are to be treated as joint or several, according to the interest of the parties in the subject matter of the contract, (s) relates only to the parties suing—not to the parties sued. If two persons covenant jointly and severally with another, the covenantee may bring an action against one of the covenantors only, though their interest in the subject matter of the covenant be joint; (t) as where *A.* lets land to *B.* and *C.* and they covenant jointly and severally with the lessor to pay the rent, or the like, he may bring an action against either of the covenantors, because they are sureties for each other for the due performance of the contract; and it is as competent for each of them to covenant for the other as it is for a stranger to covenant for both, which is a common thing. (u) A covenant by two or more persons "for ourselves and each of us," or "for ourselves and every of us," is a joint and several covenant. (x)

It has been held that where the lessees in the first covenant of a lease—"covenant jointly and severally in manner following," and then enter into various other covenants containing no words of severalty or severance that the joint and several lien in the first covenant, extends to all the subsequent covenants in the absence of any express words manifesting an intention to the contrary. (y)

If several persons enter into a joint bond or other contract, and in the obligatory part make use of the pronoun *I* instead of *we* they are jointly and severally bound. Thus, where three persons executed a bond the obligatory part of which was couched in the following terms: "I bind myself, my heirs, executors and administrators, by these presents sealed with our seals," the contract was held to be joint and several. (z)

So where a promissory note signed by two persons commenced with the words "*I* promise to pay," it was held that as the note began in the singular number it must be taken to be a joint and several promissory

(r) *Collins v. Prosser*, 1 B. & C. 682; 8 D. & B. 112.

(s) Ante, 267, 273.

(t) 1. Wms. Saund. 154, n. 1.

(u) *Enys v. Dennithorn*. 2 Burr. 1190.

(x) *May v. Woodward*, Freem. 248. *Robin-*

son v. Walker, 7 Mod. 54; 1 Salk. 393, s. c. *Bolton v. Lee*, 2 Lev. 56, 3; Reb. 39, 50, s. c. *Lilly v. Hodges*, 8 Mod. 106.

(y) *Duke of Northumberland v. Errington*, 5 T. B. 522.

(z) *Sayer v. Chaytor*, 1 Lutwyck, 696.

note. (a) And where three persons agreed to refer certain disputes between them to arbitration, and "jointly and severally" promised and agreed to perform the award and the arbitrator awarded, that two of them should pay a sum of money to the third, and settled and directed the amount that was to be paid by each, it was held that each was liable for the whole amount awarded as well as for his individual share. (b)

It has been held that if a party of friends dine together at a tavern, they are jointly and severally liable for the entire cost of the entertainment in the absence of circumstances showing an express intention to the contrary. (c) If, therefore, A. invites B. to dine at an inn, and after dinner A. goes away without paying the reckoning, B. is liable to the inn-keeper for the full amount of his bill, unless the latter *knew* that B. came as a GUEST on the invitation of A. (d) No certain rule of law, however, can be laid down to regulate the joint or several liability upon implied contracts, as the right of action entirely depends upon the varying facts of each particular case, and the inference a jury may be disposed to draw from them. In a case where provisions were furnished for the use of the officers of a regimental mess, in camp, Lord Kenyon seems to have thought that the officers were severally liable only in respect of the articles used and consumed by each. (e)

When the contract sued upon is joint and several, the plaintiff must treat the contract as wholly joint, or wholly separate, and must sue all the parties together, or each of them by himself: he cannot select two, three, or more of them as defendants, to the exclusion of the others, unless he is expressly authorized so to do. (f) If, however, some of the parties should be inadvertently omitted, the mistake is no ground of nonsuit, but advantage must be taken of the nonjoinder, as we have before seen, by a plea in abatement. (g)

It will frequently be found advisable to sue the parties to a joint and several contract separately; for if one of the joint defendants dies pending the action, his personal representative is discharged, and the surviving defendants only are chargeable. (h) In the English, as in the civil law, the pursuit of one or more of several debtors, who are each severally

(a) *March v. Ward*, Peake, 177. *Clerk v. Blackstock*, Holt, 474. *Hall v. Smith*, 1 B. & C. 409; 2 D. & R. 587. *Ex parte Buckley*, 14 M. & W. 469.

(b) *Mansell v. Burridge*, 7 T. R. 352.

(c) *Forster v. Taylor*, 3 Campb. 49.

(d) Rolle's Abr. 24, 31.

(e) *Brown v. Doyle*, 3 Campb. 51.

(f) *Streatfield v. Halliday*, 3 T. R. 782.

(g) *Saunders*, vol. 1, 291, d.; ante.

(h) Bacon's Abr. Obligation D. 4.

liable for the whole, does not affect or prejudice the right against the others, until the creditor has obtained satisfaction of his demand.

Joint and several PURCHASES.—If two persons join in giving a written order for an undivided parcel of goods, they are jointly liable for the price of them, (i) unless it appears from the written correspondence of the parties, and the surrounding circumstances of the transaction, that it was understood between the purchasers and the vendors that the former were not to be jointly responsible for the whole price, but that there should be a separate contract with each, and that each should be liable for a moiety of the purchase money, and not for the whole amount. (k)

If two persons separately employ an agent to buy goods for their separate use and consumption, and he goes into the market and purchases in one lot, the employers or principals are not jointly responsible for the payment of the purchase-money; (l) but if they give him a joint commission, they will be jointly and severally responsible for the price of them, so that any one of them may be made to pay the whole purchase-money, whether the goods, when bought, were to be disposed of for their joint benefit, or whether they were to be divided and holden by them in severalty, or disposed of for their separate use. Though the agent be not authorized to purchase on the joint account of his employers, "yet if all agree to share in goods to be purchased, and in consequence of that agreement one of them go into the market and make the purchase, it is the same as if all the names had been announced to the seller, and therefore all are liable for the value of the goods." (m)

There is an important distinction, however, to be observed between a joint purchase through the medium of an agent acting under a joint authority from the purchasers, and a sub-contract or sub-purchase from a man who bought as a principal on his own account, and was not at the time of the making of the contract, the agent of the parties who subsequently became purchasers of the goods from him. If a man, for example, goes into the market, and buys an undivided parcel or lot of goods on his own credit, and as a speculation of his own, and before he has paid the purchase-money to the party from whom he bought, sells them again in separate portions to subsequent purchasers, these last cannot of course be made responsible for the payment of the original purchase-money to the

(i) *Germain v. Frederick*, 1 Wms. Saund. 291, c.

(k) *Gibson v. Lupton*, 9 Bing. 305; 2 M. & Sc. 371.

(l) *Hoare v. Dawes*, Doug. 371. *Cooper v. Byre*, 1 H. Bl. 37. Ante, 454.

(m) Per Lord Ellenborough, *Gouthwaite v. Duckworth*, 12 East, 426. So by the French law, "Et s'ils sont plusieurs qui l'ont proposé ils en sont tous tenus solidairement sans aucune exception de division ni de discussion." Poth. (OBLIGATIONS,) No. 453.

first vendor. So if the original purchaser of an undivided parcel of goods, such as a pipe of wine, or a tun of oil, subsequently makes a sub-contract with other parties for the taking by them of particular shares in his purchase, this subdivision of his beneficial interest under the original contract does not render the persons claiming under him jointly responsible with himself for the performance of the original contract. (n)

If one of several joint contractors dies the survivors must be sued to the exclusion of the personal representative of the deceased; but if the contract be a joint and several contract the action may be brought either against the personal representative or the survivors. (o) If a release be granted to one joint contractor all will be released; and if persons are jointly and *severally* bound for the performance of a single act or duty, a release thereof as to one will operate as a release to all. (p) But a covenant not to sue one of two joint and several contractors will not operate as a release of both; (q) nor will a judgment recovered against one of them operate as a discharge to the other. (r)

(n) *Coops v. Eyre*, 1 H. Bl. 37.

(o) Ante 285, 286. *Towers v. Moor*, 2 Vern. 99.

(p) *Hammond v. Roll*, March, 202. *Cheet- ham v. Ward*, 1 B. & P. 633. *Nicholson v.*

Revell, 4 Ad. & E. 683. *Rex v. Bayley*, 1 C. & P. 435. *Cocks v. Nash*, 4 M. & Sc. 162.

(q) *Dean v. Newhall*, 8 T. R. 168. *Hutton v. Eyre*, 6 Taunt. 289.

(r) *King v. Hoare*, 13 M. & W. 494.

ADDENDA

TO

CHAPTER XIX.

LIABILITIES OF PROVISIONAL COMMITTEE-MEN.

To the last paragraph of page 518 should be added the following passage.

The mere fact of a person's having agreed to become a member of a provisional committee will not render him responsible upon the contracts and for the debts and engagements of such committee. "Such an agreement amounts to no more than a promise that he would act with other persons appointed or to be appointed for the purpose of carrying some particular scheme into effect. The term "committee" means an individual or a body to which others have committed or delegated a particular duty, or who have taken on themselves to perform it in the expectation of their acts being confirmed by the body they profess to represent or act for. An agreement to be a committee-man is an agreement to become one of that body. The schemes may be various; to establish an hospital or place of emigration to which persons are to subscribe merely for charitable motives; or partly from these motives; partly from others; or a proprietary school, or literary institution, or assembly-room in which they are to be beneficially interested as shareholders; or to obtain an act for a bridge, drainage, railroad, or canal. But whatever the object may be, it makes little or no difference in the position of the person agreeing to act as a committee-man. If the object of some, most, or all, is gain to themselves

individually, the legal consequence is the same as if the object of the parties were the most charitable and benevolent, though the result may be practically very different, in exciting an improper prejudice in the minds of the jury when the evidence is laid before them for their consideration. Such an intended association constitutes no agreement to share in profits or loss, which is the characteristic of a partnership; it would be absurd to suppose that such a relation could be meant to be created by any of those who consented to act. Could it be imagined that a person would agree to be a partner not only with those who were then named committee-men, but any that should afterwards be named by themselves, or by the projector of the company? and could those subsequently agree to become members, suppose that those previously named could ever have so intended? The truth is, the agreement to become a provisional committee-man means neither more nor less than what the words express, viz., an agreement to act on the provisional committee in carrying into effect the preliminary arrangements for petitioning parliament for a bill, and so to promote the scheme. If afterwards the provisional committee-man does act, he is responsible for his acts. (Ante, 383—385—391, 515—517.)

But there are other cases in which the question does not assume so simple a form; and where there is evidence that the defendant has not only consented to be a provisional committee-man, but has authorised his name to be inserted in a prospectus, not generally, but a particular prospectus, in which, in some cases, certain persons are described as the acting committee, in others solicitors are named, or engineer, or a secretary. If such a prospectus has been so publicly circulated with the defendant's consent, (ante 497, 498,) that the jury would presume the plaintiff knew of it, or if the plaintiff has had it shown to him at or before the time of making the contract, and has in either case acted upon it in making the contract, (ante, 499,) the question is, what inference ought a reasonable man to draw from the contents of that paper? This must of course depend upon the terms of each particular prospectus. If the prospectus states merely the names of the provisional committee and nothing more, and no light can be derived from the context, that circumstance does not alter the liability of the defendant. If not responsible as being one of that committee in fact, he cannot become so by the representation of the fact. If it states the names of the acting committee also, where that has been appointed, is the meaning that the acting committee is to take the whole management to the exclusion of the provisional com-

mittee, their provisional character having ceased, in which case the provisional committee would not be liable? (ante, 518;) or does it mean that the provisional committee-men have appointed the acting committee, or the majority of it, on their behalf, and as their agents, in which case they could be liable for the contracts of the acting committee, or the majority, made as agents? (Ante, 519.) Again, does it mean where the solicitor's name is mentioned, that such persons would be regularly employed in that character, by those of the committee who acted, or that he was already appointed by all whose names are mentioned, as their solicitor, to do all solicitor's business on their behalf? and then would arise a further question, what was the business, at the time of the contract usually transacted by solicitors for companies intending to obtain an act of parliament, and on behalf of the company? which is a question of fact to be proved by evidence." (a)

LIABILITIES OF THE REGISTERED PROMOTERS OF JOINT STOCK COMPANIES AND MEMBERS OF PROVISIONAL COMMITTEES OF MANAGEMENT INTER SE.

To the paragraph of page 508 should be added the following passage.

And it has recently been holden that a registered promoter of a provisionally registered railway company, who is appointed secretary by a provisional committee of management, cannot maintain an action against an acting member of such committee, for his salary, or for services rendered in the formation of the company, unless he can show that the latter had contracted in his individual capacity to pay him; there being no more reason for allowing one of the promoters, who has acted as secretary, to sue the committee or the members thereof for salary, than for allowing them to sue such secretary for remuneration for their trouble, attendance, and services as committeemen. And if the committee, or promoters of the project have appointed one of their own members or co-promoters, their secretary, and have collectively entered into an express contract to pay him a certain remuneration, such co-provisional committeeman or co-promoter cannot maintain an action against the committee at large, or any individual member thereof upon such contract, for being himself one of the com-

(a) Pollock, C. B., delivering the judgment of the Court of Exchequer in *Reynell v. Lewis and Wyld v. Hopkins*, 10 Jur. 973; 16 Law J., n. s., (Exch.) 30. *Barker v. Stead*, 11 Jur. 90, 91.

mitteemen or projectors, he has in effect appointed himself, and is therefore both employer and employed, and would be both plaintiff and defendant in the action. (Ante 459, 460.) But if any one or more of his co-committeemen or co-promoters contract with him individually, (ante 460—465,) he would then be entitled to sue them upon the contract. (a)

(a) *Wilson v. Lord Curzon*, 11 Jur. 47. 16 Law J., n.s. Exch. *Day v. Sharp*, 7 Law Times, 62. 11 Jur. 18.

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